United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

WILBUR K. MILLER

Friday, May 1, 1964
MD Bas
10 30 am

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

How can appellee make his deal with the eggs, when the perpetual loan cannot be paid during 1st 5 years?

No. 18,264

DANIEL PARTRIDGE III,
as Trustee u/w Grace S. Partridge,

Appellant,

v.

CLIFFORD J. HYNNING,
as General Partner of and Trustee for
Hynning Associates, a Limited Partnership,

Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 17 1964

Nathan J. Paulson
CLERK

PHILIP F. HERRICK
1001 15th Street, N. W.
Washington 5, D. C.
Attorney for Appellant

STATEMENT OF QUESTIONS PRESENTED

The questions are:

1. Whether the parties' contract for the sale of real estate requires appellant to subordinate, for the second time, his purchase money deed of trust to a new first trust to be obtained by appellee, or whether appellant's completed subordination of his trust to a new first trust, obtained by appellee in connection with the refinancing of the existing mortgage on and the remodeling of the properties sold, discharged appellant's obligation. The contract language reads as follows:

> "Seller [appellant] agrees that this second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling."

2. Whether the deed of trust given by appellee to appellant requires appellee to defray appellant's costs and expenses, including counsel fees, in the present litigation.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18264

DANIEL PARTRIDGE III, as Trustee
u/w Grace S. Partridge,

Appellant,

v.

CLIFFORD J. HYNNING, as General
Partner of and Trustee for Hynning
Associates, a Limited Partnership

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction of this proceeding under the provisions of Title 11, Section 306 of the District of Columbia Code, as set forth in the Complaint (J.A. 2). This Court has jurisdiction of the appeal under Title 28, United States Code, Sections 1291 and 1294(1), as amended.

STATEMENT OF THE CASE

This proceeding involves a suit in equity by appellee, who is an attorney, to compel appellant, who is also an attorney, to subordinate for the second time a purchase money deed of trust to a loan by a financial institution.

Briefly, appellant sold and appellee bought some property on N Street, N.W. In the contract of sale (J.A. 7-12), appellant agreed to take a purchase money deed of trust as a part of the purchase price, and he agreed to subordinate his deed of trust as follows:

> "Seller [appellant] agrees that this second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling" (J.A. 10).

Appellee obtained a construction loan, secured by a deed of trust on the property, in the amount of $132,500, and appellant duly subordinated his deed of trust to the other. Appellee's remodeling costs exceeded the net proceeds of his construction loan, and he now wishes appellant to subordinate to a new loan, also to be secured by a deed of trust, in the amount of the old loan plus the additional costs. Appellant, having already subordinated, believes that he has discharged his obligation.

In greater detail, the facts are as follows:

Prior to 1961 appellant was the testamentary trustee, under the will of Grace S. Partridge, of property at 1903-05 N Street, N.W. Life beneficiaries under that trust were and are himself and his sister; the remaindermen were and are his children and the children of his sister (J.A. 27).

On May 29, 1961 appellee submitted to appellant a written offer to purchase said property for $95,000, of which $12,000 was to be cash,

approximately $20,000 was to be by way of assumption of the then existing mortgages on the premises, and approximately $63,000 was to be secured by a "second deferred purchase money deed of trust." The offer provided that "Seller [appellant] agrees to subordinate this trust to a new first trust to be obtained for the purpose of remodeling the properties" (Stipulation As To Contents of Joint Appendix [hereinafter called Stipulation], p. 3). Appellee's offer was submitted through Victor Sadd, a real estate broker (J.A. 16).

On June 7, 1961, still through Mr. Sadd, appellant made a written counter-offer to sell the property for $103,000, of which $20,000 was to be cash, approximately $20,000 was to be by assumption of the existing mortgages, and approximately $63,000 was to be secured by a second deferred purchase money deed of trust. The counter-offer provided that "Seller agrees to subordinate this trust to a new first trust to be obtained for the purpose of remodeling the properties, provided the entire net proceeds thereof be devoted to such remodeling" (Stipulation, p. 3).

On June 27, 1961, appellee submitted another offer, and this was accepted by appellant on June 30, 1961. The contract price was $97,500, of which approximately $65,500 was to be by way of a second deferred purchase money deed of trust (J.A. 7-12). The contract provision relative to subordination has already been set forth.

During the negotiations, appellant asked appellee what remodeling he intended to do and what he estimated it would cost. Appellee replied that he intended to convert the two buildings into one, provide a single entrance and a common stairway, and install an elevator and air conditioning. He estimated the costs as follows:

Elevator	$35,000	
Air Conditioning	30,000	
Stairway	5,000	
Miscellaneous	20,000	
Total	$90,000	(J.A. 27)

On September 5, 1961 appellee executed a deed of trust to Charles E. Smoot and Victor Sadd, as trustees, to secure appellant, in appellant's capacity as testamentary trustee, in the amount of $66,971.63 (J.A. 29-34).

On March 15, 1962 appellee executed a promissory note to Perpetual Building Association for a loan of $132,500, the principal and interest being payable in monthly installments of $1,004.66. It was an 18-year note, and provided that the loan was not to be paid off during the first five years and for penalties if the loan were paid during the second five years (J.A. 35-6). The note was secured by a deed of trust on the property executed by appellee on March 15, 1962 (Stipulation, ¶ 5). On the same day appellant and his two trustees duly subordinated their deed of trust to the trust which appellee gave to Perpetual (J.A. 36-39). Also on the same day appellee agreed with Perpetual for the undertaking by appellee of the remodeling work and for the disbursement by Perpetual of the proceeds of the loan as the remodeling work advanced (J.A. 40-44), and appellee agreed with appellant that he would not alter the terms of his said agreement with Perpetual (J.A. 40).

At this point appellant believed that he had complied with his contract (J.A. 28). For at least a year nothing occurred to lead appellant to suspect that appellee contemplated any refinancing of his new first trust or that he expected appellant to do any more subordinating (J.A. 28). More than a year later, however, appellee, alleging that his remodeling costs were about $37,871[1] in excess of the net proceeds of the Perpetual loan, called on appellant to subordinate again, this time to a new loan offered by Riggs National Bank in the amount of at least $170,371[2] (Complaint, ¶s 10, 11, 12; (J.A. 4). Appellant, conscious of his duty as a trustee to obtain reasonably safe security for the deferred

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[1] This figure was later reduced to $36,320

[2] This figure was later reduced to $168,820.

purchase money note, refused (J.A. 28). This litigation followed, and the question before the Court is whether appellant is required by the terms of the contract to subordinate a second time. The matter was decided in appellee's favor by the Court below upon cross-motions for summary judgment (J.A. 53-55).

A second issue, tendered by appellant's counterclaim, relates to appellant's costs and expenses, including counsel fees, in the present litigation. In the deed of trust which appellee gave appellant on September 5, 1961 (J.A. 29-34), appellee agreed that upon any default in payment, on demand, of any sums advanced by appellant on account of any expense of litigation, such sums should attach as a lien under the deed of trust and be demandable at any time (J.A. 32). The deed of trust makes it clear that such expenses of litigation include reasonable counsel fees (J.A. 30). In his counterclaim appellant alleged that he had incurred and was incurring such expenses (J.A. 25). The Court below denied the counter-claim (J. A. 54-55).

STATEMENT OF POINTS

I. When appellant subordinated his purchase money trust he discharged his contractual obligation, as there is nothing in the contract which requires successive subordinations or subordination to a trust in an amount equal to the remodeling costs.

II. The deed of trust which appellee gave appellant requires appellee to reimburse appellant for his costs and expenses, including counsel fees, in this litigation.

SUMMARY OF ARGUMENT

I. Appellant has already subordinated his trust to a new first trust to be obtained in connection with the refinancing and the remodeling.

II. The provision of the contract that an amount equal to the entire net proceeds be used for the remodeling does not mean that the remodeling costs could not be greater than the net proceeds.

III. The contingency of subordination to a trust in an amount equal to the remodeling cost could have been but was not provided for.

IV. There is nothing to put appellant on notice that he was expected to subordinate a second time or subordinate up to the amount of the remodeling costs.

V. Costs and expenses, including reasonable attorney's fees, should have been awarded to appellant.

ARGUMENT

The question involves the meaning of words used in a contract. When appellant sold the two houses at 1903 and 1905 N Street, N.W. to appellee, there was a trust on each. The amount due under the trusts was about $20,000. A part of the purchase price was to be a trust given by the appellee to appellant and this, being junior to the trusts already on the properties, was labelled a "second deferred purchase money deed of trust."

Appellee wished to refinance so he could get rid of the small first trusts and obtain enough money to remodel the two houses into one building. To obtain such financing he would have to give a first trust, and before he could do this appellant would have to subordinate his purchase money trust. Appellant agreed to do this, and the parties wrote the following into their contract:

> "Seller [appellant] agrees that this second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling" (J.A. 10).

There is nothing in this language, whether taken as a whole or clause by clause, which requires a second subordination.

I. Appellant Has Already Subordinated His Trust to a New First Trust to be Obtained in Connection with the Refinancing and the Remodeling.

In the first clause, appellant agreed to subordinate his second trust to a new first trust to be obtained in connection with the paying off of the old first trusts and the remodeling work. On March 15, 1962 appellee secured a loan from Perpetual of $132,500 (J.A. 35-36), secured by a new deed of trust (Stipulation ¶ 5). Appellant immediately subordinated (J.A. 36-39). Appellee used the proceeds of the loan to retire the old first trusts and to pay for the remodeling work (Complaint, ¶ 8; J.A. 3). It follows that appellant subordinated his trust "to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties."

Appellant's subordination of March 15, 1962 discharges his responsibility to subordinate. He was required to subordinate to "a new first trust," not to two or more. His obligation is not a continuing one.

The parties contemplated a construction loan to be obtained by appellee prior to the beginning of the remodeling (J.A. 14, 28), and this is what appellee obtained (J.A. 40-44). Appellant, in considering whether to agree to the subordination clause, realized that he had no control over the manner and cost of the remodeling, but he also knew that lending agencies considered construction loans more hazardous than conventional loans (cf. J.A. 52, ¶ 4), that they studied the plans and specifications for the construction work, and that they limited their loans to the amount they considered safe in the light of the work to be done and the hazards of the work. Appellant considered and relied on these things in determining whether to accept the subordination clause, and, had he been asked to agree to subordinate not only to a construction

loan but also to an additional loan to replace the construction loan after the work was done, would have refused unless some further protection were given him (J.A. 28-29).

Appellant, in other words, has done everything under the contract that he contemplated he would have to do. He has done everything that the contract calls for. If appellee had a second subordination in mind he did not mention it to appellant during the negotiations, did not provide for it in the contract, and did not request it for more than a year following the subordination which appellant thought discharged his obligation.

II. The Provision That an Amount Equal to the Entire Net Proceeds be Used for the Remodeling Does Not Mean that the Remodeling Costs Could Not be Greater than the Net Proceeds.

The second clause of the agreement to subordinate reads, "provided an amount equal to the entire net proceeds be used for the remodeling." This clause gives appellee no rights; rather, it is a limitation on him. He agrees to use the entire net proceeds of his loan for the remodeling. His rights would be greater without the clause. The clause is for the protection of appellant; it does not enlarge the rights of the appellee. Cf. North Shore Realty Corp. v. Gallaher (Fla.), 114 So. 2d 634 (1959), where a similar clause was involved.

The clause does not provide that the net proceeds be at least equal to the cost of remodeling. It might have, but it did not. It simply tells appellee that he must use the net proceeds in the remodeling. The remodeling could cost $10,000 more than the net proceeds, or $36,000 more, or $100,000 more. This excess is not appellant's concern. He was concerned that the entire net proceeds be used for the remodeling because that gave him the protection he believed necessary.

III. The Contingency of Subordination to a Trust in an Amount Equal to the Remodeling Cost Could Have Been But Was Not Provided For

Had the parties desired the result which appellee seeks in this case they could easily have provided for it. They could have provided that appellant subordinate to a new first trust or to new first trusts. in an amount equal to the costs of remodeling (either estimated or actual) plus the balances due under the old first trusts. They could have provided for two or more subordinations to cover whatever the costs should come to. They did neither of these things, and the language which they did use does not permit the construction that appellant is required to subordinate a second time or to subordinate to an amount sufficient to cover the remodeling costs.

The contract was carefully drawn. The parties to it were attorneys. Presumably they meant what they said. Cf. Warner v. Warner, 99 U.S. App. D.C. 80, 84, 237 F. 2d 561 (1956). They had no trouble in providing for future contingencies where such contingencies were contemplated. They provided, for instance, for the contingency that the District Government might require off-premises parking in connection with a zoning application (J.A. 10) which appellee would make (cf. J.A. 48). They did not, however, provide for successive subordinations.

The difficulty with appellee's position is that the parties, or at least the appellant, did not contemplate successive subordinations. Appellee had the problem in mind at least prior to the time when appellant subordinated on March 15, 1962 (Stipulation as to Argument in Court Below, p. 2), but appellant had no idea of the possibility of a second subordination until more than a year after he had already subordinated once (J.A. 28). Thus it is clear that at the time of the execution of the contract of June 30, 1961, appellant did not know that a second subordination was a possibility. If appellee knew of it at that time he should have apprised appellant and incorporated the idea into the contract, for an ambiguity, if one exists, is to be construed against

the party who caused it. Couture v. Ocean Park Bank, 205 Cal. 338, 270 Pac. 943, 61 A.L.R. 267; 12 Am. Jr., Contracts, § 252. If appellee did not know of it when the contract was executed, then the possibility was not known to either party and, for that reason, was not provided for.

A canon of construction calls for any ambiguity to be construed against the party for whose benefit it was inserted, in this case the appellee. Southern Ry. Co. v. Columbian Compress Co., 280 Fed. 344, 346 (C.C.A.-4, 1922); Tuten v. Bowden, 173 S.C. 256, 175 S.E. 510, 94 A.L.R. 1443 (1934). The Tuten case involved a suit against the indorser on a note, and the defense was that the indorser was released by the many extensions given by the noteholder to the principal. The note provided that the indorser waived any benefit that might accrue by reason of "any extension of time" granted to the principal. The Court held that the indorser was relieved of liability. It stated that if "any" meant any number of extensions, then the noteholder could keep the indorser liable indefinitely. Before any such intention can be gathered it must be found to exist "with reasonable certainty." The Court also noted that a provision of a contract which does not clearly express the intention of the parties should be construed against the one for whose benefit it was inserted. It held that "any extension" must be used in its limited sense, and that whereas the indorser would not be discharged by one extension, he was discharged by several.

IV. There is Nothing to Put Appellant on Notice that He Was Expected to Subordinate Again or Subordinate up to the Amount of the Remodeling Costs.

Appellee, in his arguments in the Court below, has pointed to a statement by Victor Sadd, the real estate broker who handled the transaction, that it is customary in remodeling old buildings to obtain financing for construction and later to obtain "a conventional or permanent loan" (J.A. 14). Apparently this is intended to show that appellant

knew or should have known of the possibility of a second and larger loan. There are, however, a number of problems with this approach:

1. Mr. Sadd, while claiming that it is "customary" to refinance a construction loan when the construction is finished, conceded that this is not always done (J.A. 23). Indeed, it may not even be customary (J.A. 52, ¶ 3).

2. Mr. Sadd disclaimed knowing whether appellant knew of the alleged custom (J.A. 23).

3. The loan which appellee obtained from Perpetual was a permanent loan. It could not be called temporary (cf. J.A. 52). It ran for 18 years, could not be paid off at all during the first five years, and could be paid off only with penalty during the second five years (J.A. 35-36).

V. Costs and Expenses, Including Reasonable Attorney's Fees, Should Have Been Awarded to Appellant.

The liability of appellee for appellant's costs of litigation and counsel fees stems from the Deed of Trust of September 5, 1961 (J.A. 29-34). It is not a liability dependent upon the assessment of costs by the Court against a losing party.

As shown by his counterclaim, appellant has incurred and is incurring costs, expenses and counsel fees in connection with this litigation (J.A. 25). They are demandable at any time (J.A. 32), and the counterclaim constitutes a demand. They are not dependent upon the outcome of litigation but are due in any event. They specifically include counsel fees (J.A. 30).

CONCLUSION

The case, insofar as it relates to the obligation of appellant to subordinate for a second time, should be reversed. Insofar as it relates to expenses of litigation, it should be reversed and remanded with instructions to the Court below to fix the amount of the expenses to date and award judgment therefor to appellant.

Respectfully submitted

PHILIP F. HERRICK
1001 - 15th Street, N. W.
Washington 5, D. C.
Attorney for Appellant

INDEX

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLIFFORD J. HYNNING, as General Partner of and Trustee for Hynning Associates, a limited partnership, 1903-05 N Street, N.W., Washington 6, D.C.

Plaintiff

v.

DANIEL PARTRIDGE, III, as Trustee u/w Grace S. Partridge, 538 Investment Building, Washington, D.C.

and

VICTOR SADD, as Trustee under a Deed of Trust, 1321 Connecticut Avenue N.W., Washington, D.C.

and

CHARLES E. SMOOT, as Trustee under a Deed of Trust, 2006 Columbia Road, N.W., Washington, D.C.

Defendants

Civil Action No. 1193-63

DOCKET ENTRIES

1963	
May 9	Complaint, appearance, Exhibit A, B, C, D & E
May 31	Answer of defts #2 & #3; app. of defts P.P.
June 4	Motion of deft to dismiss; app. of Philip F. Herrick
June 11	Opposition of pltff to motion to dismiss; exhibit A & B
June 11	Deposition of Victor Sadd by pltff
July 8	Order denying motion of deft Partridge to dismiss, Curran, J.
July 17	Answer of deft #1 to complaint; counterclaim vs pltff
July 17	Motion of deft #1 for summary judgment; affidavit & attached exhibits
July 26	Statement of facts in support of defts motion for summary judgment
July 26	Cross-motion of pltff for summary judgment; opposition to defts motion for summary judgment; affidavit; exhibits F and G
Aug. 2	Opposition of deft #1 to pltfs cross-motion for summary judgment
Aug. 7	Statement of facts by pltff
Aug. 7	Answer of pltff to counter-claim

Docket Entries (Continued)

Aug. 7	Calendared
Sept. 25	Amended statement of facts
Oct. 10	Letter from Riggs Nat. Bank to pltf of Sept. 27, 1963
Oct. 16	Memorandum denying defts motion for summary judgment and granting pltf's cross-motion for summary judgment. McGarraghy, J.
Oct. 25	Affidavit of pltf re amount of Riggs Bank Financing
Oct. 25	Affidavit of attorney for deft in support of counter-claim
Oct. 25	Order granting pltf's motion for summary judgment in all respects, denying deft's motion for summary judgment and denying deft's counterclaims with costs vs. deft; by stipulation but without prejudice to right to appeal, damages assessed vs. deft Partridge in sum of $1,000.00. McGarraghy, J.
Nov. 2	Appearance pro-se of Clifford J. Hynning
Nov. 5	Notice of appeal of deft Partridge

[Filed May 9, 1963]

COMPLAINT FOR DECLARATORY JUDGMENT, SPECIFIC PERFORMANCE, BREACH OF CONTRACT AND DAMAGES

1. Jurisdiction is based upon Title 11, Sec. 306 of the D. C. Code. (1961 ed.) and the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

2. Plaintiff, Clifford J. Hynning, with offices at 1903-05 N Street, N.W., Washington 6, D.C., is the General Partner of Hynning Associates, a limited partnership organized under the laws of the District of Columbia. Plaintiff, on behalf of such limited partnership, holds title as trustee to an office building located at 1903-05 N Street, N.W., Washington 6, D.C. (hereinafter called the "N Street properties".)

3. Defendant Daniel Partridge has offices at 538 Investment Building, Washington 5, D.C., and as Trustee under the will of Grace S. Partridge is the holder of a note in the face amount of $66,961.63, secured by a second deed of trust on the N Street properties.

4. Defendant Victor Sadd is a real estate broker with offices at 1321 Connecticut Avenue, N.W., Washington, D.C., and is the trustee under a deed of trust on the N Street properties, recorded September 8, 1961.

5. Defendant Charles E. Smoot resides at 2006 Columbia Road, N.W., Washington, D.C., and is the trustee under a deed of trust on the N Street properties, recorded September 8, 1961.

6. On or about June 30, 1961, plaintiff and defendant Partridge, thru defendant Sadd, executed a contract (a copy of which is attached hereto as Exhibit A and made a part hereof) for the purchase of the N Street properties. Under this contract defendant agreed that his

> "second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling of the N Street properties".

7. Plaintiff has duly performed all the conditions of said contract on his part to be performed, and all the conditions precedent of said contract have occurred.

8. Plaintiff obtained a construction loan from the Perpetual Building Association (hereinafter called "Perpetual") in the amount of $132,500.00, of which approximately $18,000.00 was applied to retire the existing first mortgage, $2,371.00 was applied to loan fees and settlement costs, leaving $112,129.00 to be used for remodeling purposes. Perpetual's rate of interest is 6%.

9. Defendant Partridge subordinated his second deed of trust to Perpetual's construction loan, under a written agreement with plaintiff, dated March 15, 1962. (A copy of this subordination agreement is attached hereto as Exhibit B and made a part hereof.)

10. Plaintiff completed the remodeling of the N Street properties at a total cost of approximately $150,000.00, which was approximately $37,871.00 in excess of the net proceeds of Perpetual's construction loan.

11. On April 8, 1963, The Riggs National Bank (hereinafter called "Riggs") advised plaintiff that it would make a first trust loan at 5 1/2% in the amount of $176,500.00 on the N Street properties. Riggs committed itself for a period of 45 days from April 8, 1963. (A copy of which commitment is attached hereto as Exhibit C and made a part hereof.)

12. Pursuant to the contract of June 30, 1961, (Exhibit A) plaintiff, on April 10, 1963, requested defendant Partridge by letter to agree to subordinate his second deed of trust to the proposed Riggs first trust loan reduced to cover only the cost of remodeling in excess of the net proceeds of Perpetual's construction loan.

13. On April 17, 1963, defendant Partridge refused plaintiff's request for subordination to the proposed Riggs first trust loan (a copy of which refusal is attached as Exhibit D and made a part hereof). Defendant Partridge continues in said refusal notwithstanding the specific provisions of the contract set forth in paragraph 6 above and defendant Partridge has failed and refused to perform said agreement to subordinate.

14. On April 24, 1963 defendant Sadd, who acted as broker in the contract between plaintiff and defendant Partridge, wrote plaintiff (A copy of which letter is attached hereto as Exhibit E and made a part hereof.) that he understood

> "That it was agreeable to the seller to subordinate to a first mortgage providing the amount did not exceed the existing mortgages and the cost of remodelling."

and further,

> "It is customary in construction of new buildings and remodelling of old buildings to obtain financing for construction and when completed, re-appraising on the basis of new values and income with a conventional or permanent loan."

15. Immediate and irreparable injury and damage will be suffered by plaintiff if the defendant continues to refuse to subordinate the second trust on the N Street properties to new first trust financing obtainable by plaintiff in the amount of Perpetual's construction loan (that is the existing first mortgage) and the cost of remodelling in excess of the net proceeds of Perpetual's construction loan.

16. Defendant Partridge will be unjustly enriched through holding a second deferred purchase money trust which will be substantially senior in lien to that agreed to by both plaintiff and defendant under the contract of June 30, 1961 referred to in paragraph 6 above. The amount of damages are now and will be incapable of any exact determination and plaintiff has no other adequate remedy.

WHEREFORE Plaintiff prays:

(1) That this Court issue a declaratory judgment that defendant Partridge has breached the terms and provisions of the subordination clause in the contract between defendant Partridge and plaintiff, and declare the rights and other legal relations of plaintiff and defendant Partridge.

(2) That this Court order defendants or such of them as the Court may determine to be liable to plaintiff in the premises, to specifically perform and to subordinate the second deferred purchase money deed of trust to such new financing as plaintiff may obtain in the net amount necessary to discharge the existing first mortgage held by Perpetual Building Association and to cover the costs of remodelling plaintiff's properties at 1903-05 N Street, N.W., Washington, D.C., in excess of the net proceeds of Perpetual's construction loan.

(3) That this Court order defendants or such of them as the Court may determine to be liable to plaintiff in the premises to pay plaintiff such damages as may be found to be due and owing to plaintiff resulting from the refusal of defendants to subordinate, including differences in interest costs from the date of this action, together with costs of this action.

(4) That plaintiff have such other, further, and different relief as may be required by equity and good conscience and to this Court may seem meet and proper.

/s/ Clifford J. Hynning, as a General Partner and as Trustee of Hynning Associates, a Limited Partnership
Plaintiff

/s/ Lawrence C. Moore, Attorney

* * *

District of Columbia to wit:

Clifford J. Hynning being duly sworn, deposes and says that he is the plaintiff in the foregoing complaint; that he has read the complaint and knows the contents thereof: that the matters set forth therein are true to his own knowledge except as to those matters which are alleged to be on information and belief and as to those matters he believes them to be true.

/s/ Clifford J. Hynning

[JURAT - Dated May 9th, 1963]

[Filed May 9, 1963]

EXHIBIT A (Complaint)

RANDALL H. HAGNER & COMPANY
Incorporated
REALTORS
1321 Connecticut Avenue, N.W.

Washington, D. C. - June 27, 19 61

RECEIVED OF CLIFFORD J. HYNNING

a deposit of Four Thousand - - - Dollars ($4,000.00) check cash

to be applied as part payment in purchase of _____ Lot s 2 and 3

in Square 115

with improvements thereon, known as 1903, 1905 N Street, N.W., Washington, D.C. Purchaser to have the free use of the furniture and fixtures now rented to the tenants and belonging to Daniel Partridge and Charlotte P. Olney until April 30, 1962, or until purchaser has complete possession, whichever is sooner.

together with ~~lighting and plumbing fixtures, heating and cooking appliances, and refrigerator attached to the premises~~

sold for Ninety Seven Thousand Five Hundred - - Dollars ($97,500.00)

allocated as follows:	(1) Land included in lots 2 & 3 Square 115 -	$27,500.00
upon the following terms:	(2) Buildings and improvements thereon -	70,000.00
		$97,500.00

Approximately Twenty Thousand Dollars ($20,000.00) by assuming existing first mortgages now liens on said premises, originally given to secure the principal sum of $42,000.00, being $14,000.00 on each of Lots 2, 3 and 5 (1903, 1905 and 1909 N Street N.W.) Square 115, bearing interest at the rate of 4-1/2% per annum. Payable monthly together with amortization of principal, in the amount of Two Hundred and Ten Dollars ($210.00) on the two properties hereby contracted for. Eight Thousand Dollars ($8,000.00) upon settlement, by check.

Continued on Attachment 1.

Trustees in all deeds of trust are to be named by the parties secured thereby.

This sale is made subject to Owner's approval.

The property is sold free of encumbrance except as aforesaid; title is to be good of record and of fact, subject, however, to covenants, conditions and restriction of record, if any; otherwise the deposit is to be returned and the sale declared off at the option of the purchaser, unless the defects are of such character that they can readily be remedied by legal action, but the seller and Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect title, such action must be taken promptly by and at seller's expense, whereupon the time herein specified for full settlement will thereby be extended for a reasonable period necessary for such action.

Examination of title, tax certificate, conveyancing, notary fees, State revenue stamps, if any, and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser who hereby authorizes the undersigned Agent to order the examination of title; provided, however, that if upon examination the title should be found defective, and is not remedied as aforesaid, the seller hereby agrees to pay the cost of the examination of the title.

Seller agrees to execute and deliver a good and sufficient special warranty deed, and to pay for Federal revenue stamps on the deed.

Property is sold and shall be conveyed subject to existing tenancy as follows:

Attachment 2.

In the event seller is personally in possession of property, he agrees to give possession at the time of settlement.

Seller assumes the risk of loss or damage to said property by fire or other casualty until the executed deed of conveyance is delivered to the purchaser or is recorded for him by the Title Company making the settlement.

All notices of violations of Municipal orders or requirements noted or issued by any Department of the District of Columbia and for the District of Columbia, or actions in any Court on account thereof, against or affecting the property at the date of settlement of this contract, shall be complied with by the seller, and the property conveyed free thereof. This provision shall survive the delivery of the deed of conveyance hereunder.

Within 75 days of the date of acceptance hereof by the seller, or as soon thereafter as a report on the title can be secured, or report of survey obtained from the Surveyor of the District of Columbia, if required, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof. Settlement is to be made at the office of the Title Company examining the title. If the purchaser shall fail to make full settlement, the deposit herein provided for, may be forfeited at the option of the seller as liquidated damages for the breach of this contract and not as a penalty, in which event the purchaser shall be relieved from further liability hereunder, or, without forfeiting the deposit, the seller may avail himself of any legal or equitable rights and remedies which he may have under this contract.

Rents, taxes, water rent, sewer charges, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted as of the date of transfer. Taxes, general and special, are to be adjudged according to the certificate of taxes, as issued by the Collector of Taxes of the District of Columbia, except that assessments for improvements completed prior to the date hereof,

whether assessment therefor has been levied or not, shall be paid by the seller or allowance made therefor at the time of transfer.

The entire deposit shall be held by Randall H. Hagner & Company, Inc., until settlement hereunder is made or until the deposit is forfeited.

If the property described in this contract is located in a place outside the District of Columbia, wherever any reference is made to the District of Columbia or any official thereof, in the printed portions of this contract, then the name of the State and County in which the property is located and the proper official thereof shall be construed to be substituted for the words "District of Columbia." If the property is accorded service by the Washington Suburban Sanitary Commission, annual benefit charges of said Commission are to be adjusted to date of transfer and assumed thereafter by purchaser.

The principals to this contract mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns; that this contract contains the final and entire agreement between the parties hereto, and that they shall not be bound by any terms, conditions, statements, warranties or representations, oral or written, not herein contained.

The Seller agrees to pay Randall H. Hagner and Company, Inc., $_____ _____ for its services, and authorizes the deduction of said amount from the proceeds of sale at time of settlement.

Attachment 3.

Made in _____

RANDALL H. HAGNER & COMPANY, INC., Agents

By /s/ R. H. Hagner, Jr.

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

/s/ Clifford J. Hynning
Purchaser

_____
Purchaser

/s/ Daniel Partridge, III, Trustee u/w
Grace S. Partridge & Agent
Seller

June 30, 1961
Date of Acceptance

Attachment 1.

The balance of approximately Sixty Five Thousand Five Hundred ($65,500.00) dollars will be paid by the Purchaser or his assigns, executing, acknowledging and delivering a note and second deferred purchase money deed of trust covering the premises above described, bearing interest at the rate of six percent (6%) per annum, to be computed from the date of closing hereunder and to be payable on a date six (6) months after said date and semiannually thereafter. The principal of said purchase money note and mortgage shall be payable in the amount of Two Thousand and No/100 ($2,000.00) dollars semi-annually, commencing Twelve (12) months after all tenancies, as hereinbelow described, shall have been vacated and the premises turned over to the physical possession of the Purchaser, until the balance shall be due and payable Fifteen (15) years after date of settlement. Seller agrees that this second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodelling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling. Any owner of the mortgaged premises may prepay an additional Two Thousand ($2,000.00) dollars of the principal of the second deferred purchase money deed of trust at any semi-annual principal payment date, with interest to the date of such payment only. Deed of trust to be in usual District of Columbia form in use for office buildings with all security provisions, including a provision that the maker will keep up the properties. Note and deed of trust to contain an acceleration clause.

If off-premises parking is required by the D. C. Government in connection with the conversion of the premises to office building use, the Seller agrees for an additional consideration of a cash payment of Two Thousand Five Hundred ($2,500.00) dollars to permit the Purchaser to provide one parking space at the rear of premises 1909 N Street, N.W., by removing the 14' x 17', one story, basement and roof-deck addition.

Attachment 1. (Continued)

In the alternative, if such alternative is satisfactory to the D. C. Government, the Seller may procure a lease of some other parking space at a rental not to exceed twenty-five ($25.00) dollars per month. Any such removal to be at the Purchaser's expense, who agrees to replace the French doors on the second floor opening on to the roof deck with two 3/ -x3/10 double-hung windows, or to apply the cost of such replacement on account of a balcony for the use of the second-floor apartment. The purchaser also agrees to close up with masonry the present doors into the rear rooms of 1909 from the second floor and basement, to remove the plaster from the new rear walls and waterproof the same, and to bring the space created by the removal to alley grade and surface the same. One of the parking spaces created to be used by Purchaser for a period of Ten (10) years from the date of exercise of this option for a rental of Twenty five ($25.00) dollars per month. If additional off-premises parking is not required, this paragraph shall be null and void.

This sale includes all right, title and interest, if any, of the Seller in and to any land lying in the bed of any street, road or avenue opened or proposed, in front of or adjoining said premises, to the center line thereof, and all right, title and interest of the Seller in and to any award made or to be made in lieu thereof and in and to any unpaid award for damage to said premises by reason of change of grade of any street; and the Seller will execute and deliver to the Buyer, on closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

Attachment 2.

Month-to-month tenancies of basement and 1st floor, 1903; Lease of 3d-floor apartment, 1903, terminable on 60 days' notice in event of sale; Lease of studio apartment, 1905, terminating January 14, 1962; Lease of basement apartment, 1905, terminating April 30, 1962; Lease

Attachment 2. (Continued)

of 3d-floor apartment, 1905, terminating April 30, 1962.

Seller agrees to use his best efforts in cooperation with the purchaser in inducing the tenants to vacate the premises at the earliest moment.

Attachment 3.

If this sale be consummated, the Seller agrees to pay Randall H. Hagner and Company, Inc., 5% on first $50,000.00 and 3% on balance, for its services, and authorizes the deduction of said amount from the proceeds of sale at time of settlement.

If two or more persons constitute either the Seller or the Buyer, the word "Seller" or the word "Buyer" shall be construed as if it read "Sellers" or "Buyers", whenever the sense of this agreement so requires.

The Buyer may assign this contract and his respective rights and interests thereunder to any other persons, partnership or corporation. But it shall be understood and agreed that the Buyer named in this agreement shall execute the purchase money bond or note to be given as required by this agreement so as to render himself personally liable for the amount of such mortgage debt and execution and delivery of such bond shall be the consideration given by the said Buyer for the right to assign this agreement.

CWK
AP

_____

[Filed May 9, 1963]

EXHIBIT D (Complaint)

Law Offices of
DANIEL PARTRIDGE, III
and
FRANKLIN P. GOULD
Investment Building
* * * Washington 5,D.C. * * *

April 17, 1963

Clifford J. Hynning, Esq.
General Partner, Hynning Associates
1903 N Street, N.W.
Washington 6, D.C.

Dear Cliff:

I have now heard from my sister, to whom you so kindly sent a copy of your letter of April 10, 1963, and I must deny your request that we agree to subordinate our second trust to the new financing by the Riggs Bank.

We think it unwise that I should reduce the security for our second trust loan and will therefore not consent to any subordination which would do so. Any subordination which merely decreased the interest rate on the first trust, but did not increase the amount of that trust or decrease the amortization payments thereon, would be agreeable.

I am sorry to have to turn down this request, not because of the request itself, but because I would like to accommodate you in any way I can which would not conflict with my obligations as Trustee.

With my best wishes,

Sincerely yours,

/s/ Daniel Partridge, III
Tr u/w Grace S. Partridge

[Filed May 9, 1963]

EXHIBIT E (Complaint)

RANDALL H. HAGNER & COMPANY
Incorporated
REALTORS - MORTGAGE BANKERS

* * * * * * * * *

April 24, 1963

Mr. Clifford Hynning
1903-05 "N" Street Northwest
Washington, D.C.

Dear Clifford:

Replying to your inquiry concerning the intent of the subordination clause written into the contract for sale of 1903-1905 "N" Street Northwest, it was my understanding that it was agreeable to the seller to subordinate to a first mortgage providing the amount did not exceed the existing mortgages and the cost of remodelling.

It is customary in construction of new buildings and remodelling of old buildings to obtain financing for construction and when completed re-appraising on the basis of new values and income with a conventional or permanent loan.

Very truly yours,

/s/ Victor
Victor Sadd

EXCERPTS FROM DEPOSITION OF VICTOR SADD

Washington, D. C.
June 6, 1963

* * * * *

MR. MOORE: Let the record show that it has been stipulated that Mr. Victor Sadd is a duly licensed real estate broker in the District of Columbia.

Thereupon,

VICTOR SADD,

a Trustee Defendant in the above-entitled cause, was called for examination by counsel for plaintiff, and after having been sworn by the notary was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. MOORE:

Q. Mr. Sadd, how long have you been a licensed real estate broker? A. Three and half years.

* * * * *

Q. Would you tell us your experience in selling commercial real estate and your experience in converting commercial real estate to commercial purposes? A. I brought my first property in the Dupont Circle area as an investor in 1926, 1612 - 20th Street, Northwest, which I remodeled as a studio apartments, owned and operated until 1956. I also acquired two other properties in the same block, 1600 block Connecticut Avenue, both of which I remodeled and owned and operated. This was as an individual investor, not as broker. As a broker I sold a little over a million dollars worth last year as evidenced by my present from the Washington Real Estate Board (displaying a pencil).

Q. So you are a member of the million dollar sales club of the Washington Board of Realtors, is that right? A. 1962. Most of them Northwest -- generally speaking if you enlarge the Dupont Circle a little

bit and take it up as far as Columbia and Adams Mill Road, that is extending it a little perhaps, that is the furthermost north in this general area. Also leasing and arranging for financing of a number of properties. You don't wish me to enumerate them, I hope.

Q. How long have you had experience in the financing and commercial real estate? A. Since 1922.

Q. Roughly 40 years? A. Right.

Q How did you happen to interest Mr. Hynning in the purchase of the properties at 1903 N Street, Northwest? A. A chance meeting when both of us were walking through N Street going east to the University Club for lunch Mr. Hynning said at some time he would like to acquire a building on N Street that he could convert to office space.

5 Q. Was he specific -- A. Nope.

Q. -- that it was to be for office space? A. Yes. About two years later having known Mr. Partridge for many years as a close associate, squash playing and social friend, I presented Mr. Partridge's properties to Mr. Hynning. And to make a long story short, I made a sale.

Q. Were there any obstacles besides that of price in the closing of this deal for this property? A. Several.

Q. What were some of those?

* * * * *

A. Parking was one.

Q. Anything else? Was there anything said about getting a building permit? A. I don't remember any from Mr. Partridge's point of view, no.

6 Q. How about anything concerning the subordination of either existing trusts or new trusts?

* * * * *

A. Well, all I can say, it had to be discussed because it became a part of the contract.

Q. Were these suggestions very numerous? Did you have several conversations on the subordination agreement? A. No, Mr. Hynning requested it and I wrote some language in the original contract which I

thought fitted the case, one similar to one I had just finished. And that was changed by Mr. Partridge and extended considerably and Mr. Hynning accepted.

Q. Mr. Sadd, what do you mean by the expression "extended" you

7 just used? A. Well, a lot more verbage. Mine was about three sentences and we finished up with I don't know how many. Extended to me means enlarged, expanded; whatever term or adjective you care to use, the intent is the same.

Q. I take it your answer was that the person who drafted this subordination clause was whom, Mr. Partridge? A. Mr. Partridge.

Q. Right. Now, was there any discussion of any limitation on the obligation of the seller to subordinate?

* * * * *

A. Not that I heard of.

8 Q. -- of Mr. Partridge? A. None that I heard of with one exception. At the settlement it seems to me there was some discussion, but our settlement clerk, Mr. Anderson, and myself did not participate. It was between the two lawyers who appeared to be getting a state of meeting of the minds, so I can't answer with any information to any value.

Q. Would you tell us what this parking obstacle was on the sale of the building?

* * * * *

9 THE WITNESS: Based on the zone under which these buildings are located, when you remodel you have to provide a certain number of parking spaces according to increase in density of usage. You get certain formula. You are allowed so many feet without providing parking and then you are supposed to provide so much. Mr. Hynning and I went over this in great detail and came up with a finding that he would in order to meet code requirements have to provide one and a fraction, as I recall, and in order to do this Mr. Partridge agreed to sell him the back half of the third building that Mr. Partridge owned, 1909, a piece of the back, which Mr. Hynning would pay a certain amount for -- I don't think the amount is important -- and provide parking space to meet the code. In

the meantime we applied for a variance before the Board of Zoning
10 Adjustments for this one and a fraction automobiles that you have to provide parking space for and Mr. Hynning carried that through himself and was granted the exemption by the Board of Zoning Adjustments.

MR. HERRICK: Excuse me. Mr. Moore, let me ask you if the business about the parking space isn't contained in the contract?

MR. MOORE: I believe there is material in the contract on the parking part.

MR. HERRICK: All right.

BY MR. MOORE:

Q. Was there considerable delay in the final execution of the contract because of these negotiations concerning parking space for office and office building? A. No special delay. I would say less than you normally have when you are dealing with the District of Columbia, which is generally.

Q. Could you give us a rough idea of what period transpired?

* * * * *

MR. HERRICK: I am perfectly willing to stipulate, Mr. Moore,
11 that the plaintiff made an offer through Mr. Sadd on 5/29/1961, and a second offer on June 7, 1961, and the third offer on June 27, '61, which latter offer was accepted on June 30, 1961.

* * * * *

MR. MOORE: It is accepted.

* * * * *

Q. Mr. Sadd, I show you a letter signed by you dated April 24, and ask if you can identify that? A. Yes. I wrote that letter.

* * * * *

Q. Mr. Sadd, is it your opinion as a real estate broker and operator of some forty years that it was the intention of the parties or their under-
12 standing as expressed in your letter that the seller would subordinate to the full, entire cost of remodeling?

* * * * *

MR. HERRICK: Wait, just a minute, Mr. Sadd, please. I certainly am going to have to object to that on the ground that the question of subordination is fully covered in the contract, and I don't understand the question. It appears in the form of a hypothetical question to an expert and yet it comes down not to a question of opinion, but to a question of what was the understanding of the parties.

MR. MOORE: Is this an objection that you are making?

MR. HERRICK: Yes.

A. All I can say is I have answered the question to the best of my ability.

MR. HERRICK: In the letter?

THE WITNESS: In the letter.

MR. HERRICK: Well --

BY MR. MOORE:

Q. That is your answer then to the question? A. That is my answer.

MR. HERRICK: Well, I -- then I will have to include in my objection the further objection that I do not yet accept Mr. Sadd as an expert.

BY MR. MOORE:

Q. Mr. Sadd, again from your experience, some forty years in the commercial real estate business in this area, is it possible to determine in advance the cost of remodeling an apartment house for use as a commercial office building?

MR. HERRICK: Please note my continuing objection to Mr. Sadd's expertise and questions based on them.

MR. MOORE: Would you answer the question.

A. I can best answer it by saying that I have not been able to guess or get estimates a hundred per cent accurate. Usually when you start something of this type you have a plan, you have architects, you have estimates, and then you change your mind a little bit as you go along, which -- as to the cost -- and invariably they come up higher -- usually they come up higher than the best estimates, particularly on remodeling.

Q. Mr. Sadd, in your opinion what is the present market value of

these premises, 1903 N Street? · A. Do you object to my answering that? A round figure, I will give you my guesstimate, $300,000. It is not an appraisal.

* * * * *

14 Q. Mr. Sadd, in effecting the sale of these premises you acted as agent for Mr. Partridge, did you not? A. Yes.

MR. HERRICK: I will stipulate that.

BY MR. MOORE:

Q. And Mr. Partridge was the seller, was he not? A. Correct.

MR. HERRICK: Stipulated.

BY MR. MOORE:

Q. And you were paid by Mr. Partridge?

MR. HERRICK: Stipulated.

A. Correct.

Q. You received your commission from him? A. Correct.

Q. Did Mr. Partridge ever tell you that he wanted to have the

15 balance of money due him in a safe second purchase money mortgage or words to that effect? A. That is the way it is written in the contract. That speaks for itself.

MR. HERRICK: I take it the answer is that is in the contract?

THE WITNESS: That is in the contract.

MR. HERRICK: All right. Whatever the contract says, it is in there.

THE WITNESS: I don't think any conversation has any bearing on it whether we had any or not, and I wouldn't remember it or try to.

MR. HERRICK: All right.

* * * * *

16 [BY MR. MOORE:]

Q. Mr. Sadd, from your knowledge of the real estate practice in financing properties in Washington, could you tell us what the cost of third trust money is, roughly? A. Never having borrowed any, I could not give any opinion. The guess, and again --

MR. HERRICK: No, no.

THE WITNESS: You don't want a guess. All right, I haven't borrowed any so I wouldn't know.

BY MR. MOORE:

Q. Have you arranged any third trust financing? A. No. Second trust; not third.

Q. What is the cost of second trust money? A. Ten to twelve points plus six per cent interest. Ten to fifteen I can say, too.

Q. For how long a period would that be? A. Can I give an illustration, Mr. --

Q. Yes, give us an illustration. A. -- Counselor?

MR. HERRICK: Well, Mr. Sadd, I think you are testifying at this point from your --

THE WITNESS: Personal experience.

17 MR. HERRICK: -- knowledge.

THE WITNESS: Yes.

MR. HERRICK: If your knowledge is based on one transaction I would hesitate to accept it. If you are going to tell us simply about one transaction and say that is the extent of you knowledge, then I would object to your expertise in the field. And you said, "May I give an illustration."

THE WITNESS: Would 50 transactions be enough for you to think I had --

MR. HERRICK: Let's not argue it back and forth. I am simply coming to your statement about an illustration which indicated your particular transaction. I will object to the expert testimony and I don't think I will from now on because I think we understand that I do have a continuing objection. Now the question was what was the cost of second trust money. He answered that.

MR. MOORE: Yes, and I said for how long a period.

MR. HERRICK: For how long a period. Why don't you just answer that?

THE WITNESS: I will give you a contract base. National Mortgage and Investment, the largest in the city, charges four per cent a year plus six per cent interest.

BY MR. MOORE:

18 Q. For how long a period? A. As long as the trust runs four per cent a year; four points a year plus six per cent.

Q. In addition to the interest cost? A. Yes. A man who I prefer not to name puts out union money --

Q. You mean labor union money? A. Labor union money.

Q. Pension funds? A. And he charges twelve points, as I understand, for three years and it varies according to the --

Q. This is second trust money? A. Second trust money.

Q. But you haven't been in on any third trust financing? A. No, no. I prefer to avoid them.

Q. Are there many firms in Washington that are available as sources of third trust financing? A. None that I know of. There are some. None that I know of.

MR. MOORE: We have no further questions.

EXAMINATION BY COUNSEL FOR DEFENDANT PARTRIDGE

BY MR. HERRICK:

* * * * *

19 Q. You told us that you had been licensed as a real estate broker for three and a half years. Prior to that, I believe, you ran the Washington Regional Office of the Social Security Administration, did you not?

A. District office, to be accurate.

Q. Did you arrange for Mr. Hynning the Perpetual Building Association loan? A. I did not.

Q. You had no participation in that? A. No.

Q. Do you know the terms of that loan? A. He arranged that himself.

Q. Did you arrange the proposed Riggs loan? A. No, Mr. Hynning did that himself.

Q. You had no participation in that? A. No.

* * * * *

20 Q. * * * Mr. Hynning's original offer was contained on a contract

form? A. Right.

Q. Was it not? A. That is correct.

Q. And that was given by you to Mr. Partridge? A. Correct.

Q. Then there was a second one and we have stipulated that it was dated June 7, 1961. That was also in writing and given by you to Mr. Partridge? A. Correct.

* * * * *

Q. In your letter of April 24, 1963, which is attached to the complaint in this case as Exhibit E you stated that it is customary, and I am not conceding your expertise when I ask you this question, "It is customary in construction of new buildings and remodeling of old buildings to obtain financing for construction and when completed reapprasing on the basis of new values and income with a conventional or permanent loan"? A. Yes.

Q. You are not stating knowledge of any such custom unto Mr. Partridge, are you, so far as you know? You say it is customary. Do you know whether or not he knows of any such custom? A. I don't know what Mr. Partridge knows on that subject. I wouldn't dream of giving any opinion.

* * * * *

Q. There are many original loans which are not superseded by loans that come along later, isn't that true?

* * * * *

THE WITNESS: I have expressed my opinion here. I say it is customary.

BY MR. HERRICK:

Q. All right then, I am asking you whether it is always done? A. No, I don't think there is any such generality you can say about financing anything. I still say it is customary.

* * * * *

[Filed July 17, 1963]

CLIFFORD J. HYNNING, etc.,
Plaintiff
v.
DANIEL PARTRIDGE III, etc., et al.,
Defendants
Civil Action No. 1193-63

ANSWER AND COUNTERCLAIM OF DEFENDANT PARTRIDGE, TRUSTEE

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

Defendant admits the allegations of Paragraphs 2, 3, 4, 5, and 6 of the Complaint; admits the allegations of Paragraph 8 that plaintiff obtained a construction loan from Perpetual Building Association in the amount of $132,500, of which approximately $18,000 was applied to retire the existing first mortgages and that Perpetual's rate of interest is 6%; alleges that he is without knowledge sufficient to form a belief as to the remaining allegations of Paragraph 8 or as to the allegations of Paragraphs 10 and 11; admits the allegations of Paragraph 9, except that Exhibit B attached to the Complaint is not the subordination agreement of the parties; admits all allegations of Paragraph 12 except the allegation that the letter referred to therein was pursuant to the contract of April 10, 1963, which allegation is denied; admits all the allegations of Paragraph 13 except the allegation that he has failed and refused to perform the subordination agreement, which allegation he denies; defendant says that the allegations of Paragraph 14 are immaterial; he denies the remaining allegations of the Complaint.

Fourth Defense

On the 3rd day of October, 1962, there was recorded among the land records of the District of Columbia a third deed of trust whereby plaintiff conveyed the "N" Street properties referred to in the Complaint to Lang and Singman, Trustees, to secure a loan from Clarke H. Kawakami in the amount of $15,000. The lien of this third trust would

be superior to a part or all of the lien of this defendant if the subordination sought in this suit were required by the Court. The holder of the loan secured by this third deed of trust and the Trustees named therein are indispensable and necessary parties to this action.

COUNTERCLAIM

The deed of trust to defendants Victor Sadd and Charles E. Smoot, securing the $66,961.63 note of the defendant Daniel Partridge III, Trustee u/w Grace S. Partridge, mentioned in the Complaint, was executed by plaintiff. In that deed of trust, plaintiff agreed to reimburse this defendant for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity which might arise in respect to that trust or to the note secured by that trust. This defendant has incurred and is incurring costs and expenses and reasonable counsel fees in this litigation which are in respect to that trust and to the indebtedness secured thereby. The full amount of those costs, expenses, and reasonable counsel fees can only be determined upon the termination of this litigation.

WHEREFORE, this defendant prays:

1. For judgment against plaintiff in the amount of the costs, expenses, and reasonable counsel fees incurred by this defendant on account of this litigation.

2. For such other and further relief as to the Court may seem meet and proper.

/s/ Philip F. Herrick
Attorney for defendant Daniel
Partridge III, Trustee

* * *

[Certificate of Service]

[Filed July 17, 1963]

MOTION OF DEFENDANT PARTRIDGE, TRUSTEE, FOR SUMMARY JUDGMENT

Defendant Partridge, Trustee, moves for summary judgment in the above cause, for the following reasons:

Plaintiff complains that this defendant has not complied with the terms of an agreement to subordinate a deed of trust held by him to a new deed of trust obtained by plaintiff, but, as is fully shown by the pleadings herein (Complaint, Answer, Affidavit of this defendant attached to this Motion), without any issue of fact, this defendant has subordinated his deed of trust to a deed of trust obtained by plaintiff, he has complied fully with his agreement to subordinate, and that agreement is now functus officio.

This defendant's argument is more fully set forth in the accompanying Points and Authorities.

Respectfully submitted,

/s/ Philip F. Herrick
Attorney for Defendant Daniel Partridge III, Trustee

* * *

[Certificate of Service]

[Filed July 17, 1963]

AFFIDAVIT OF DEFENDANT PARTRIDGE, TRUSTEE, IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA: SS

Daniel Partridge III, being first duly sworn, on oath deposes and says:

1. That he is one of the defendants in the above-entitled cause as Trustee u/w Grace S. Partridge, a citizen of the United States, over twenty-one years of age, of sound mind, is competent to testify to the matters stated in this affidavit, and makes this affidavit on personal knowledge, except for those matters which he states are made on information and belief.

2. Prior to 1961 he was the owner as testamentary trustee under the will of Grace S. Partridge of property known as 1903 and 1905 N Street, N.W., Washington, D. C. Life tenants under the said trust are himself and his sister; the remaindermen are his children and the children of his sister.

3. During the negotiations for the contract dated June 27, 1961, a copy of which is attached to the Complaint as Exhibit A, he asked plaintiff what remodeling work he intended to perform on the N Street properties and what was his estimate of the cost of that work. Plaintiff answered that he intended to turn the two buildings, 1903 and 1905 N Street, N.W., into one, provide a common entrance and common staircase, install air conditioning and install an elevator; and that he estimated the cost of remodeling as follows:

$ 35,000	- Elevator
30,000	- Air Conditioning
5,000	- Staircase
20,000	- Miscellaneous work
$ 90,000	- Total

4. Settlement of the sale took place September 5, 1961, at which time plaintiff executed the deed of trust referred to in ¶6 of the Complaint. A copy of said deed of trust is attached hereto as Exhibit A.

5. Affiant states on information and belief that on March 15, 1962 plaintiff obtained a loan from the Perpetual Building Association in the amount of $132,500, with interest at 6%, principal and interest being payable in monthly installments of $1,004.66; that plaintiff gave Perpetual his promissory note (a copy of which is attached hereto as Exhibit B), secured by a deed of trust (copy attached as Exhibit C).

6. On March 15, 1962 affiant duly subordinated his deed of trust of September 5, 1961 to Perpetual's deed of trust. A copy of the subordination agreement is attached as Exhibit D. Exhibit B, which is attached to the Complaint and designated in ¶9 thereof as the "subordination agreement", is not the subordination agreement but is a special agreement entered into between plaintiff and affiant concerning the disbursement of plaintiff's loan from Perpetual. A complete copy of said special agreement, with the attachment referred to therein, is attached hereto as Exhibit E.

7. On December 8, 1962 an advertisement by plaintiff appeared in the Evening Star stating that "Attorney Clifford J. Hynning has remodeled two town houses at 1903 and 1905 N Street, N.W., into an elevator building with 46 offices on four floors." About March 25, 1963, affiant received a phone call asking him if he would agree to subordinate his second trust to a new mortgage of $176,500 by Riggs National Bank. At no time during the negotiations for the contract or during affiant's numerous dealings with plaintiff after the contract was signed up until the phone call of about March 25, 1963 did plaintiff or anyone else request of affiant any subordination other than the subordination to one "new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties" agreed to in the contract of sale. Until that phone call, no mention whatsoever was made of any subordination to any refinancing of this "new first trust." And nothing occurred to lead affiant to believe or suspect that plaintiff wanted any right of subordination to any refinancing of the "new first trust," or contemplated any refinancing of the "new first trust" after the remodeling was completed. The first time affiant heard of any claim to the effect that it is customary in the remodeling of old buildings to obtain a construction loan and replace that loan with a "permanent" loan after completion, was after the telephone conversation of about March 25, 1963.

8. At the time of the negotiations for that contract and at the time the contract was signed and delivered, affiant was advised by plaintiff that plaintiff's architect had not completed his plans and specifications for the remodeling work. Affiant, in considering whether or not to agree to the subordination clause in the sales contract, was conscious of his duty as trustee for others to obtain reasonably safe security for any deferred purchase money note. He realized that under the terms of the agreement he had no control of the manner and cost of the remodeling of the properties. He knew, however, that lending agencies generally considered construction loans more hazardous than conventional loans, studied the plans and specifications for the construction work, and limited the loan to an amount

they considered safe in the light of the work to be done and the normal hazards of that work. Affiant relied on this in agreeing to the subordination clause, and if he had been asked to agree to subordinate, not only to a construction loan, but to an additional loan to replace the construction loan after the work was done, would have refused unless some further protection were given him.

/s/ Daniel Partridge III

[JURAT dated July 17th, 1963]

EXHIBIT A
(Affidavit of Daniel Partridge)

THIS DEED OF TRUST

Made on this fifth day of September, A. D. 1961, by and between Clifford J. Hynning, General Partner, under an Agreement of Limited Partnership, dated July 25, 1961, a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, as Trustee, of Arlington, Arlington County, State of Virginia, party hereto of the first part, and Victor Sadd and Charles E. Smoot, of the District of Columbia, parties hereto of the second part.

WHEREAS, the party hereto of the first part is justly indebted unto Daniel Partridge, III, Trustee u/w Grace S. Partridge, in the full sum of Sixty-six Thousand Nine Hundred Seventy-one Dollars and Sixty-three Cents ($66,971.63) for and being deferred purchase money for the sale of the hereinafter-described property, for which sum he has made, signed, and delivered his one certain principal promissory note bearing even date herewith, providing in part as follows:

> For value received, we jointly and severally, promise to pay to the order of Daniel Partridge, III, Trustee u/w Grace S. Partridge, the sum of Sixty-six Thousand Nine Hundred Seventy-one Dollars and Sixty-three Cents ($66,971.63) at the office of the payee, with interest from November 5, 1961 until paid at the rate of 6% per annum, said interest payable in semiannual installments commencing

six months after the date hereof. Said principal payable in semi-annual installments of $2,000 each, with the privilege of making additional payments of $2,000 on account of principal at any semi-annual principal payment date. The balance, after application of the semiannual installments, to be due and payable fifteen years from the date hereof. Payments of the semiannual installments on account of principal shall commence April 30, 1963.

If default is made in the payment of any installment of principal or interest, when and as due on this promissory note, or if default is made in the performance of any of the terms, covenants and conditions of the Deed of Trust securing this note, the whole of the principal sum of this note then remaining unpaid, together with accrued interest thereon, shall become instantly due and payable. The Makers agree to pay all proper costs and expenses of collection, including reasonable attorney's fees, in the event of such default.

AND WHEREAS, the party hereto of the first part desires to secure the full and punctual payment of said debt and interest thereon as well as any and all substitutions, renewals, or extensions of said note or of any part thereof or of any substituted note, with interest on such renewals or extensions at such rate of interest as may be agreed upon, and of any notes given for interest covering any extension with interest thereon from maturity of the same (which renewals or extensions of the debt or any part thereof, hereby secured, or any change in its terms or rate of interest payable on same, shall not impair in any manner the validity of, or priority of this Trust); and also to secure the reimbursement to the holder or holders of said note and to the parties hereto of the second part, or the survivor or his heirs or substituted Trustee, and any purchaser or purchasers, grantee or grantees under any sale or sales under the provisions of this Trust, for all money which may be advanced as herein provided for, and for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity, which may arise in respect to this Trust, or to the indebtedness or to the property herein mentioned, or in obtaining possession of the premises after any sale which may be made as hereinafter provided for.

NOW THEREFORE, THIS DEED OF TRUST WITNESSETH: -

That the party hereto of the first part, in consideration of the premises and of One Dollar in lawful money, does grant, bargain, sell, and convey unto

the parties hereto of the second part in fee simple, the following-described land and premises; with the improvements, easements, rights, ways, and appurtenances thereunto belonging, situate and lying in the City of Washington, District of Columbia, namely: -

> Lots Two (2) and Three (3) in Thomas Sunderland's subdivision of lots in Square One Hundred Fifteen (115), as per plat recorded in Liber No. 10, Folio 53, of the Records of the Office of the Surveyor of the District of Columbia.

TO HAVE AND TO HOLD the said described land and premises unto and to the only use of the said parties hereto of the second part, in fee simple.

IN AND UPON THE USES AND TRUSTS FOLLOWING, that is to say: -

FIRST: Until any default in payment of any matter of indebtedness hereby secured as herein provided for, to permit the said party hereto of the first part, his successors and assigns, to possess and enjoy said described premises and to receive the issues and profits thereof; and on full payment of said note, and of any substitutions, extensions, or renewals thereof, and the interest thereon, and all sums advanced or expended in respect of this Trust (including cost of advertising and such commissions as may be allowed by law and are not otherwise herein provided for), to release and reconvey in fee unto and at the cost of the said party hereto of the first part or the party or parties then claiming under him, the aforesaid land and premises.

SECOND: Upon any default being made in payment of said note or of any installment of principal or interest thereon, or of any substitution, renewal, or extension thereof, or of any note or notes hereafter given for interest covering any extension, with interest thereon from maturity of the same, when and as the same shall become due and payable; or upon any default in payment, when due, of any tax or assessment, general or special, now or hereafter assessed against said land and premises or any part thereof, while this Trust exists, or upon any default in keeping, while this Trust exists, fire and extended-coverage insurance on the buildings on said land in an amount, in the name, and to the satisfaction of the parties

hereto of the second part, who may select and designate the company or companies in which such insurance shall be placed, and who shall apply whatever may be received therefrom to the payment of the matters hereby secured, whether then due or not, unless the party secured hereby shall waive the right to have the same so applied, or upon any default in payment, on demand, of any sum or sums advanced by the holder or holders of said note on account of any costs and expenses of this Trust, or on account of any such tax or assessment, or insurance, or expense of litigation, with interest thereon at six per centum from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax, or assessment, or insurance, or expense of litigation as aforesaid, the same may be paid by the holder or holders of said note, and all sums advanced in so doing, with interest, as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then upon any and every such default so made as aforesaid, the said parties hereto of the second part, or the survivor or his heirs or substituted Trustee, shall sell the aforesaid land and premises and improvements at public auction at such time and place, upon such terms and conditions, and after such previous public notice, with such postponement of sale or resale as to the said parties hereto of the second part, or the survivor or his heirs or substituted Trustee, shall seem best for the interest of all parties concerned; and (the terms of sale being complied with) shall convey in fee to and at the cost of the purchaser the premises so sold, such purchaser being hereby discharged from all liability for the application of the purchase money; and shall apply the proceeds of sale (after paying all expenses of sale, all taxes and assessments thereon due, all sums advanced for costs or taxes and assessments, or insurance or expense of litigation as aforesaid, with interest as aforesaid, and a Trustee's commission of five per centum (5%) on the gross amount of the sale), to the payment of the aforesaid indebtedness, or so much thereof as may then remain unpaid, whether then due or not, and the interest thereon to date of payment (it being agreed that the said note shall, upon such sale being made before the maturity of said note or before the maturity of any substitution therefor, or renewal or extension thereof,

be and become immediately due and payable, at the election of the holder thereof), paying over the surplus, if any, to the said party hereto of the first part, his successors or assigns, upon the surrender and delivery to the purchaser, his, her, or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession thereof.

AND the said party hereto of the first part does hereby covenant: that he will warrant specially the property hereby conveyed; that he will execute such further assurances of said land as may be requisite for vesting title in the said parties hereto of the second part, for the uses and purposes and upon the trusts hereinbefore declared; that he will pay the aforesaid taxes and assessments and insurance premiums as the same become due and payable during the existence of this Trust; and that he will keep the property in good repair and clean and in good order.

AND the said party hereto of the first part, for himself and his successors and assigns, in order to further secure the payment of said note, does hereby assign to the parties hereto of the second part and the holder or holders of said promissory note each and all of the leases and other rental agreements, oral and written, which may be in force at the time of any of and after the above-mentioned defaults; and authorizes said holder or holders to collect all rents from said land and premises; and all money received under this assignment and authorization shall be applied to the reduction of said indebtedness, after first deducting therefrom such reasonable costs and expenses, including attorney's fees, court costs, and all other items of expense as may be incurred in and about the collection of said rent; and agrees that in the event of any such default a receiver may be appointed to take over the operation of said land and premises and the rents, issues, and profits thereof, upon the application of the holder or holders of said note.

AND the parties hereto covenant and agree that said holder or holders shall be entitled to remove, substitute, or add a Trustee or Trustees, at the option of said holder or holders, with or without cause or notice, by instrument duly executed, acknowledged, and filed for record in the Office of the Recorder of Deeds for the District of Columbia.

AND the said party hereto of the first part covenants and agrees that all personal property used in connection with the operation of the buildings, together with all fixtures now or hereinafter attached to the premises, shall be deemed to be an accession to the freehold and a part of the realty, and the same are covered by this Deed of Trust and included in the terms "land" and "premises" wherever used herein.

Said land and premises are now subject to a prior First-Trust lien. The holder of said note and the parties hereto agree that the lien created by this Trust may be subordinated to a new First Trust, provided the entire net proceeds thereof be used to pay the balance due on the present First Trust and the remodeling of the improvements on said land. The Trustee or Trustees acting hereunder shall execute such further instruments as may be desirable to effectuate this right of subordination.

The party hereto of the first part, for himself and his successors and assigns, agrees to promptly pay, as and when due, any and all indebtedness secured by any lien on said land and premises which is now or may hereafter be prior to the lien created by this Deed of Trust, or which may be a cloud on the title of the said party hereto of the first part to said land and premises.

IN TESTIMONY WHEREOF, on the day and year first hereinbefore written, the said party hereto of the first part has hereunto set his hand and seal.

/s/ Clifford J. Hynning [SEAL]
General Partner under an Agreement of Limited Partnership, dated July 25, 1961, a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, as Trustee.

Signed, sealed, and delivered
in the presence of: -

/s/ C. E. Bradbury

EXHIBIT B
(Affidavit of Daniel Partridge)

PROMISSORY NOTE

$132,500.00 March 15th, 1962

For Value Received I hereby jointly and severally promise to pay to the order of THE TREASURER OF PERPETUAL BUILDING ASSOCIATION at the office of said Association in Washington, District of Columbia, or at such other place, or to such other party or parties, as the holder of this note may from time to time designate, the principal sum of ONE HUNDRED THIRTY-TWO THOUSAND, FIVE HUNDRED Dollars, with interest at the rate of six% per annum upon all principal remaining from time to time unpaid; principal and interest to be paid in monthly installments of ONE THOUSAND, FOUR AND 66/100 Dollars ($1,004.66) each, in all respects as provided by or under the Constitution and By-Laws of said Association and the Deed of Trust which secures this note.

The undersigned jointly and severally waive presentment, protest and demand, notice of protest, demand and dishonor and nonpayment of this note and agree to pay all costs of collection and of any trustees' sale or foreclosure under the instrument securing repayment of this indebtedness, when incurred, including reasonable attorneys' fees, and to perform and comply with each of the covenants, conditions, provisions and agreements contained in every instrument now evidencing or securing repayment of this indebtedness.

The Treasurer is authorized and directed to pay real estate taxes on the property described in the instrument securing repayment of this indebtedness, and the undersigned jointly and severally promise to pay such taxes in equal monthly installments in addition to the monthly payments of principal and interest.

The undersigned hereby jointly and severally waive the benefits of all homestead exemption laws.

This note is given for a loan of $132,500.00 and is secured by a Deed of Trust of even date herewith which is a lien on real estate in the District of Columbia and known as Lots 2 and 3 in Square 115.

Loan not to be paid off during the first five-year period. 2% advance interest on outstanding balance if paid off the sixth year reducing 1/2 of 1% each year thereafter.

/s/ Clifford J. Hynning, General Partner under Agreement of Limited Partnership and Trustee under Deed in Trust.

* * *

[Filed July 17, 1963]

EXHIBIT D

WHEREAS, CLIFFORD J. HYNNING, General Partner under an Agreement of Limited Partnership known as HYNNING ASSOCIATES, dated July 25, 1961 a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, and Trustee under Deed in Trust dated September 5, 1961, recorded September 8, 1961, Instrument No. 27117, is the owner of the following described property situate in the District of Columbia, namely:-

Lots 2 and 3 in Thomas Sunderland's subdivision of lots in Square 115, as per plat recorded in Liber No. 10 folio 53 of the Records of the Office of the Surveyor of the District of Columbia.

AND WHEREAS, there exists on the above described property a Deed of Trust dated September 5, 1961 and recorded September 8, 1961 as Instrument No. 27118 among the Land Records of the District of Columbia, to VICTOR SADD and CHARLES E. SMOOT, as Trustees, to secure DANIEL PARTRIDGE, III, Trustee under Will of Grace S. Partridge,

Sixty Six Thousand, Nine Hundred and Seventy one and 63/100 Dollars ($66,971.63) represented by one promissory note described in and secured by said Deed of Trust.

AND WHEREAS, the said DANIEL PARTRIDGE, III, Trustee under Will of Grace S. Partridge, is still the present holder of said note, secured by said Deed of Trust.

AND WHEREAS, the said CLIFFORD J. HYNNING, General Partner under an Agreement of Limited Partnership known as HYNNING ASSOCIATES, dated July 25, 1961 a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, and Trustee under Deed in Trust dated September 5, 1961, recorded September 8, 1961, Instrument No. 27117, has secured a loan of One Hundred and Thirty two Thousand, Five Hundred Dollars ($132,500.00) on the above described property, which loan is secured on said premises by a Deed of Trust from the said CLIFFORD J. HYNNING, General Partner under an Agreement of Limited Partnership known as HYNNING ASSOCIATES, dated July 25, 1961 a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, and Trustee under Deed in Trust dated September 5, 1961, recorded September 8, 1961, Instrument No. 27117, dated March 15th, 1962 and recorded or to be recorded herewith among the Land Records of the District of Columbia to SAMUEL SCRIVENER, JR. and JUNIOR F. CROWELL, Trustees, to secure PERPETUAL BUILDING ASSOCIATION, in accordance with the Constitution and By-Laws of said Association and under the security of the Note secured thereby.

AND WHEREAS, it is a requirement of the said PERPETUAL BUILDING ASSOCIATION that the Deed of Trust dated September 5, 1961 and Recorded September 8, 1961 as Instrument No. 27118 among the Land Records of the District of Columbia, and all the terms, provisions, rights and privileges therein contained, be subordinated to the lien, operation and effect of said Deed of Trust dated March 15th, 1962 and recorded or to be recorded among the Land Records of the District of Columbia.

AND WHEREAS, it is now the intention of the parties hereto to

subordinate the said Deed of Trust recorded September 8, 1961 as Instrument No. 27118, to the lien and effect of the Deed of Trust securing the said PERPETUAL BUILDING ASSOCIATION.

NOW THEREFORE, THIS AGREEMENT, WITNESSETH, that for and in consideration of the premises and of the sum of One Dollar to each of them paid, the said CLIFFORD J. HYNNING, General Partner under an Agreement of Limited Partnership known as HYNNING ASSOCIATES, dated July 25, 1961 a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, and Trustee under Deed in Trust dated September 5, 1961, recorded September 8, 1961, Instrument No. 27117, present owner of said property, VICTOR SADD and CHARLES E. SMOOT, Trustees under said Deed of Trust recorded September 8, 1961 as Instrument No. 27118 among the aforesaid Land Records, and DANIEL PARTRIDGE, III, Trustee under Will of Grace S. Partridge, present holder of the note secured under said last mentioned Deed of Trust, hereby covenant and agree with the said SAMUEL SCRIVENER, JR. and JUNIOR F. CROWELL, Trustees under Deed of Trust dated March 15th, 1962 and recorded or to be recorded among the Land Records of the District of Columbia, and PERPETUAL BUILDING ASSOCIATION, party secured under last mentioned Deed of Trust, that all the terms, provisions, rights, and privileges contained in said Deed of Trust recorded September 8, 1961 as Instrument No. 27118 of said Land Records, be, and the same are hereby subordinate to the lien, operation and effect of said Deed of Trust dated March 15th, 1962 and recorded or to be recorded among said Land Records, and of the note secured thereby, with like force and effect as if said Deed of Trust dated March 15th, 1962 and recorded or to be recorded among said Lands Records, and the note secured thereby had been made, executed, delivered and recorded prior to the execution and delivery of the said Deed of Trust recorded September 8, 1961 as Instrument No. 27118 of said Land Records.

IN TESTIMONY WHEREOF on the 15th day of March, 1962, the said CLIFFORD J. HYNNING, General Partner under an Agreement of Limited Partnership known as HYNNING ASSOCIATES, dated July 25, 1961 a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, and Trustee under Deed in Trust dated September 5, 1961 recorded September 8, 1961, Instrument No. 27117, present owner of above described property, VICTOR SADD and CHARLES E. SMOOT, Trustees under said Deed of Trust, recorded September 8, 1961 as Instrument No. 27118, and DANIEL PARTRIDGE, III, Trustee under Will of Grace S. Partridge, party secured under said Deed of Trust and present holder of said note, have hereunto set their hands and seals.

(SEAL)

CLIFFORD J. HYNNING, General Partner,
as aforesaid, Present owner of property,

(SEAL)

(SEAL)

Trustees under Deed of Trust

(SEAL)

Holder of the Note.

EXHIBIT E
(Affidavit of Daniel Partridge)

In consideration of the execution of that certain subordination agreement dated March 15, 1962 affecting Lots 2 and 3 of Square 115, I hereby agree with Daniel Partridge, III, Trustee under will of Grace S. Partridge, not to alter the terms and conditions of disbursement of the construction loan as set forth in the annexed copy of an Agreement dated even date between the undersigned and Perpetual Building Association, without the written consent of the said Daniel Partridge, III, Trustee as aforesaid.
WITNESS their hands and seals this 15th day of March, 1962.

/s/ Clifford J. Hynning [SEAL]

(agreed)
/s/ Daniel Partridge III [SEAL]
Tr u/w Grace S. Partridge

THIS AGREEMENT

Made this 15th day of March A.D., 1962, between Clifford J. Hynning, Trustee of Washington, D. C. Party of the first part, hereinafter called the Borrower, and E. A. Thomas, as Treasurer of Perpetual Building Association, a voluntary unincorporated association of the District of Columbia, and his successors in office, party of the second part, hereinafter called the Lender.

WHEREAS, the Lender is to loan the Borrower the sum of $132,500.00 to be used in paying for and on account of labor and materials performed and furnished in the construction of a building and other improvements on the real estate situate in the District of Columbia and described as: Lots 2 & 3, in Square 115 and

WHEREAS, simultaneously herewith the Borrower has executed and delivered a certain note of even date with these presents for the repayment of said sum of $132, 500.00 with interest, and a certain deed of trust of even date with these presents securing said note upon said real estate, together with said building and improvements thereon to be constructed, and

WHEREAS, the Borrower covenants to construct on said real estate said building and improvements in accordance with the plans therefor filed with and duly approved by the Inspector of Buildings of District of Columbia and the specifications therefor filed with the Lender.

NOW THEREFORE it is mutually agreed between the Borrower and the Lender, as follows:

1. That construction on the within described property will commence no later than thirty days after recording of the deed of trust, otherwise the Lender reserves the right to cancel the commitment.

2. That said sum secured by said note and deed of trust and so to be loaned shall be advanced by the Lender to the borrower in payments as set forth in and fixed by Schedule A hereto annexed and hereby expressly referred to and made a part hereof.

3. That the Borrower shall make request for each said payment at least three days before the same shall be called for, to permit the Lender to inspect said building and improvements and determine if the same has progressed to the stage of construction fixed for the payment.

4. That the Borrower shall accept each said payment within thirty days after the same is due.

5. That no payment shall be due unless in the judgment of the Lender, all work usually done at the stage of construction fixed for the payment shall have been done in a good and workmanlike manner, and all materials and fixtures usually furnished and installed at that stage shall have been furnished and installed; but the Lender may pay any part or the whole of any payment before it becomes due, and the same shall be deemed to have been made in pursuance of this Agreement.

6. That the Lender may deduct from any payment to be made under this Agreement, the amounts necessary for, and pay any encumbrance, tax, assessment or other charge or lien upon said real estate and said building and improvements thereon to be constructed, existing at any time, whether before or after the date hereof, and all such amounts so paid shall be deemed to be advanced under and secured by said note and deed of trust.

7. That the Borrower shall exhibit and deliver to the Lender whenever requested by him, receipts showing the full payment of all labor and material then performed and furnished in the construction of said building and improvements.

SCHEDULE A
PAYMENTS

$18,000.00 to be disbursed at settlement and the balance disbursed as follows:

Disbursements will be in accordance with the builder's monthly requisitions approved by the architect and the owner. An inspection and approval by this office will also be required before disbursement. The requisition shall call for a 10% retainer from the contractor.

The amount of each disbursement shall be for the percentage that the loan represents of the total cost. A net amount of 10% of our loan after charges for appraiser's fee, etc. shall be retained as a final payment until final inspection and the release of liens have been approved.

The designation of Borrower whenever in this Agreement used shall cover and include the individual, individuals, partnership or corporation named and acting as Borrower, where the context so admits or requires.

8. That the Lender may employ a watchman to protect said building and improvements from depredation and injury, and the cost thereof shall be deemed an advance under and secured by said note and deed of trust.

9. That if the construction of said building shall be discontinued or not carried on with reasonable dispatch in the judgment of the Lender, at any time, the Lender may provide materials and labor to protect said building from depredation and injury, or complete said building under said plans and specifications; and the cost thereof shall be deemed to be advances under and secured by said note and deed of trust.

10. That in the event of the death of the Borrower, while the owner of said real estate, the Lender will, in case the construction of said building is continued, continue to make the payments under this Agreement to the Executor or the Administrator of the Borrower, and all such payments so made shall be deemed to have been made as if made to the Borrower in his lifetime, and under and secured by said note and deed of trust.

11. That in the event the Borrower shall part with or, except by death, be deprived of title to said real estate, the Lender may, at his option, continue to make the payments under this Agreement to such successor in title, and such payments so made shall be deemed to have been made under and secured by said note and deed of trust.

12. It is expressly agreed that, in any of the following events, all obligations on the part of the Lender to make any further payments under this Agreement shall, if the Lender so elects, cease and terminate, and said note and deed of trust shall, at the option of the Lender, become immediately due and payable, (but the Lender may make payments without becoming liable to make other or further payments):

(a) If the Borrower shall assign any one of said payments or any interest therein.

(b) If said real estate shall be conveyed or encumbered, in any way, without the written consent of the Lender.

(c) If said building and improvements shall be materially injured or destroyed by fire or otherwise, in the judgment of the Lender.

(d) If the Borrower shall fail to comply with any one of the covenants in this Agreement contained.

(e) If any of the materials or fixtures used in the construction of said building and improvements be not purchased so that ownership thereof will vest in the Borrower free from encumbrance, upon delivery at said building.

(f) If the Borrower shall not construct said building and improvements in accordance with said plans and specifications therefore.

(g) If the Lender is not permitted to enter upon said real estate and inspect the building and improvements thereon, at all reasonable times.

(h) If, by reason of the death of the owner of said real estate, the heirs, devisees or legal representatives of such owner shall permit or allow the construction of said building and improvements to be discontinued for a period of thirty days.

(i) If the Borrower shall make any conditional purchases, of, or execute any chattel mortgages on any materials or fixtures used in the construction of said building and improvements, or pertinent thereto.

(j) If the Borrower shall fail to comply with any requirement of the government of and of any and all its departments and bureaus with regard to said building and improvements and the construction thereof, within thirty days after notice, in writing, thereof from the Lender to the Borrower.

(k) If the construction of said building and improvements be, at any time, discontinued or not carried on with reasonable dispatch, in the judgment of the Lender.

13. It is mutually covenanted and agreed by and between the parties hereto, on behalf of themselves and of their respective legal representatives that said note and deed of trust delivered contemporaneously with this Agreement are subject to all of the covenants, stipulations and agreements in this Agreement contained, to the same extent and effect as if they were fully set forth in and made a part of said note and deed of trust; and it is further expressly covenanted and agreed that, if the Borrower shall fail to observe, complete or perform any of the covenants, stipulations or agreements contained in said note and deed of trust and in this Agreement, then, at the option of the Lender, said note and deed of trust shall become immediately due and payable, anything to the contrary notwithstanding.

IN WITNESS WHEREOF, the Borrower and Lender have signed their names and affixed their seals on this Agreement on the day and year first hereinbefore written; and if the Borrower is a corporation, it has caused its corporate name to be hereunto set by its President and its corporate seal to be hereunto affixed and attested by its Secretary.

Signed, Sealed and Delivered in
the Presence of:

/s/ Ralph C. Falcone
Witness

/s/ Clifford J. Hynning, Trustee [SEAL]

[Filed July 26, 1963]

CROSS-MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFF AND IN OPPOSITION TO DEFENDANT PARTRIDGE'S MOTION FOR SUMMARY JUDGMENT

Upon the annexed affidavit of Clifford J. Hynning and upon the defendant Partridge's motion papers for summary judgment and upon all the pleadings and proceedings heretofore had herein and upon the statements hereafter fully set forth, plaintiff respectfully moves for an order under Rule 56 of the Federal Rules of Civil Procedure for summary judgment in favor of plaintiff and against defendant on the ground that there is no genuine issue of any material fact, that defendant Partridge's answer is of no substance and shows on its face that defendant Partridge has no valid ground of defense to this action and that plaintiff is entitled to a judgment as a matter of law.

Respectfully submitted,

/s/ Lawrence C. Moore
* * *
Attorney for Plaintiff

[Certificate of Service]

[Filed July 26, 1963]

AFFIDAVIT OF PLAINTIFF CLIFFORD J. HYNNING, TRUSTEE FOR AND GENERAL PARTNER OF HYNNING ASSOCIATES, IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA: SS

I, Clifford J. Hynning, being duly sworn depose and say:

1. I am an attorney with offices at 1903-05 N Street, N. W., Washington 36, D. C. I have been engaged in the general practice of law for approximately 29 years, and I am also the general partner of Hynning Associates, a limited partnership organized under the laws of the District of Columbia, owning and operating an office building at the above address.

2. During the Spring of 1961, I was shown two properties known as 1903-1905 N Street, N. W. (hereinafter called the N Street properties),

by co-defendant Victor Sadd, a real estate broker employed by the firm of Randall Hagner and Company with offices at 1321 Connecticut Avenue, N. W., Washington, D. C., as buildings suitable for conversion into a professional office building.

3. On or about May 29, 1961, I made a written offer to purchase the N Street properties for a price of $95,000 on the condition, inter alia, that the Seller agrees to subordinate this trust to a new first trust to be obtained for the purpose of remodeling the properties (Exhibit A to deposition of co-defendant Sadd, which is on file in this Court).

4. On or about June 7, 1961, defendant Partridge made a written counter-offer to me to sell the properties for $103,000, including his agreement, inter alia....."to subordinate this trust to a new first trust to be obtained for the purpose of remodeling the properties, provided the entire net proceeds thereof be devoted to such remodeling" (Exhibit B to said deposition).

5. On or about June 27, 1961, I made a second written offer to defendant Partridge, which he accepted on June 30, 1961, in the form shown in Exhibit A attached to the complaint.

6. Defendant Partridge and co-defendant Sadd fully understood and agreed that (a) I acquired the N Street properties soley for the purpose of remodeling them into a professional office building. (b) a basic part of the consideration for the purchase of the N Street properties at the price of $97,500 was the express obligation of defendant Partridge to subordinate his purchase-money deed of trust to new financing to be obtained in connection with the existing mortgage (which I had assumed) and the remodeling without any limitation as to the nature, amount of timing of such remodeling except as stated in para. 8 below, and (c) such subordination agreement constituted an integral part of the contract of sale and induced me to purchase the N Street properties at the price of $97,500.

7. Defendant Partridge, co-defendant Sadd, and I fully realized that it was impossible at the time of sale to determine the actual costs of remodeling the N Street properties from apartment use into a professional office building, for such costs depended on many variable factors, to wit:

(a) the question whether the District Government would require the remodeler to provide off-street parking, in which case I would have exercised the option given in the contract of sale to use for such parking facilities the rear of defendant Partridge's adjacent property at 1909 N Street with resulting demolition, repair and construction costs, or would grant a zoning variance, which the District Government eventually did, as set forth in para. 9 below;

(b) the preparation of detailed architectural and engineering drawings and specifications;

(c) the obtaining of a building permit from the District Government on the basis of detailed architectural and engineering drawings and specifications;

(d) the negotiation (with assistance from defendant Partridge) of the surrender of leases running into the anticipated construction period;

(e) the letting of contracts for the various phases of remodeling as set forth in para. 11 below;

(f) the arranging for a construction loan and its placement cost;

(g) the actual completion of the remodeling, as more particularly described in para. 11 below;

(h) the obtaining of an occupancy permit from the District Government allowing the remodeled premises to be occupied and rented as a professional office building; and

(i) the final determination of remodeling costs on the basis of an independent audit of the construction accounts and the settlement and release of mechanics liens, as set forth in para. 14 below.

8. As of the time of the contract of sale (June 30, 1961), neither defendant Partridge nor I knew, or could know, the scope of the remodeling of the N Street properties from apartment to office use, the length of time required or the total dollar costs, and consequently neither party could place, nor did they place, any limitation on the subordination clause except that defendant Partridge required that the net proceeds of the financing to which he would subordinate his purchase-money lien "be used for the

remodeling of the N Street properties." Defendant Partridge placed no limitation on his obligation to subordinature in terms of the nature of the remodeling or its cost or the time or times when he would subordinate.

9. The first major hurdle in arranging for the remodeling of the N Street properties into a professional office building was the off-street parking requirement, which depended on the computation of the square footage of the various floors of the combined buildings, the relationship of such footage to the street and alley elevations, the determination of so-called parking "credits" for existing apartments, and the computing of the number of parking spaces required to be provided on the basis of the foregoing in connection with a change in use from apartments to offices. I applied to the Board of Zoning Adjustments for a variance, a public hearing was held before the Board, and the variance was eventually granted.

10. In the meanwhile, I employed architects and engineers on a time basis to prepare plans and specifications of the remodeling operation for submission to the District Government to secure a building permit, which was eventually granted.

11. I distributed the architectural and engineering plans and specifications to various contractors and solicited their bids, as a result of which I let fixed-price contracts for the elevator and the air conditioning, heating and ventilating and let a cost-plus contract (i.e., time and materials plus overhead and profit) to a general contractor for such other phases of remodeling of the N Street properties into a professional office building as demolition, excavation, concrete and masonry, electric work and fixtures, lathing and plastering, ceramic and asphalt tile, carpentry, millwork, lumber and drywall, metal doors, metal frames, steel bucks, rough and finish hardware, metal louvres, repair of sheet metal, acoustic ceilings, glazing, painting, plumbing, and miscellaneous cleaning and trucking.

12. I secured a construction loan from the Perpetual Building Association (hereinafter called Perpetual) in the amount of $132,500, of which approximately $18,000 was used to retire the outstanding first mortgage which I had assumed at the time I purchased the property from defendant Partridge and approximately $2,371 was applied to loan fees

and settlement costs, leaving approximately $112,129 as the net proceeds of the construction loan to be used for remodeling purposes.

13. On November 2, 1962, the District Government issued an occupancy permit for the use of the N Street properties as a professional office building, thereby signalling the fact that the remodeling of the N Street properties from apartment use to professional office use was completed.

14. I employed Salter & Co., certified public accountants, to audit the construction accounts and records of the various contractors for the purpose of determining charges for time, materials and various extras that had been authorized during the course of remodeling as well as charges for contractors' overhead and profit. This audit resulted in a total cost of remodeling of $147,920.87, on the basis of which final settlements of the construction accounts were effected on November 16, 1962.

15. I requested Perpetual, which had handled the construction loan on an open basis, to consider a larger loan based on the completion of the remodeling of the N Street properties into an office building, but Perpetual declined in view of the recent changes of the Internal Revenue Code affecting the savings and loan industry as such changes applied to Perpetual's investments in commercial mortgages. A copy of a letter from Perpetual is attached hereto.

16. I thereupon applied for new financing to the Riggs National Bank (hereinafter called Riggs), which, after receiving an appraisal report on the N Street properties in the amount of $265,000, offered to make a first trust loan at 5 1/2% in the amount of $176,500. Riggs has orally advised me that it stands ready to loan $176,500 or such lesser amount as I may request and to extend its commitment beyond the date originally stated in the letter attached as Exhibit C to the complaint.

17. I requested defendant Partridge to subordinate to the new Riggs financing and offered to pay him in cash $6,000, thereby reducing his second purchase-money deed of trust by that amount which was approximately equal to the amount by which the new Riggs financing exceeded the actual cost of remodeling and the retirement of the first mortgage, as set forth in paragraphs 12 and 14 of this affidavit.

18. Defendant Partridge informed me that he was not interested in cash or reducing his principal, whereupon I modified my request to him to subordinate to the proposed Riggs financing by reducing the face amount of such financing from $176,500 to $168,820 so as to cover only the actual cost of remodeling in excess of the net proceeds of Perpetual's construction loan and the retirement of the original first trust, which I had assumed from defendant Partridge.

19. The refusal of defendant Partridge to subordinate to the Riggs refinancing has made it necessary for me to renew the third trust on the N Street Properties cited in defendant's answer, 4th defense, which I had planned to liquidate from the proceeds of the new Riggs financing and has made it necessary for me to secure other and more costlier financing.

/s/ Clifford J. Hynning

[JURAT dated July 26, 1963]

[Filed August 7, 1963]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

CLIFFORD J. HYNNING, etc., Plaintiff	)	
v.	)	C. A. No. 1193-63
DANIEL PARTRIDGE III, etc., et al, Defendants	)	

ANSWER TO COUNTERCLAIM OF DEFENDANT FOR COSTS EXPENSES AND COUNSEL FEES

The plaintiff herein, by counsel, respectfully answers the counterclaim of defendant Partridge for costs, expenses and counsel fees as follows:

1) Any counterclaim by defendant Partridge for costs, expenses and reasonable counsel fees would be authorized under the deed of trust only if there had been a default by plaintiff under the note or under the obligation of the deed of trust. The default proviso has nothing whatsoever to do with any litigation to compel defendant Partridge to carry out his obligations as seller under the contract of sale and defendant Partridge has not alleged that there has been any default in any respect by plaintiff buyer. Consequently there is no obligation of plaintiff to pay costs, expenses and counsel fees under the deed of trust.

2) Wherefore, having answered the counterclaim, plaintiff prays that the counterclaim be dismissed and for such other and different relief as may appear meet and proper.

/s/ Lawrence C. Moore
* * *
Attorney for Clifford J. Hynning,
Plaintiff.

[Certificate of Service]

[Filed September 25, 1963]

AFFIDAVIT OF F. RUST BISHOP

DISTRICT OF COLUMBIA: SS

F. Rust Bishop, being duly sworn, on oath deposes and says:

1. I am an attorney and have been a member of the District of Columbia Bar since 1927; since 1940 I have been an attorney for, and since 1942 an officer of, the First Federal Savings and Loan Association, devoting my full time to its affairs; I have also worked directly in the Loan Department of said Association and made disbursements on construction loans; I have personally worked on the papers involving thousands of real estate loans in the Washington Metropolitan area. During the course of my experience of more than 23 years of dealing with construction and other mortgage loans in the Washington Metropolitan area I have received information about thousands of such loans and have become familiar with the business of making such loans and the customs in force regarding the same.

2. The promissory note executed by Clifford J. Hynning to the Perpetual Building Association dated March 15, 1962 is an 18-year note. It provides that the loan may not be paid off during the first five years, and provides penalties if it is paid off during any of the four following years. In my opinion, the said note represents a permanent loan; the loan cannot in any sense be called temporary.

3. In my opinion, most construction loans placed by District of Columbia saving and loan associations and building and loan associations are placed on a permanent basis, allowing from six (6) months to one (1) year for completion of construction before the first payment becomes due; in such cases a takeout permanent loan is not necessary or customary.

4. Lending agencies normally lend less on a construction loan for remodeling, because of the risks involved, than they would lend if the remodeling were already completed.

/s/ F. Rust Bishop

[JURAT: dated September 20, 1963]

[Filed September 25, 1963]

AFFIDAVIT OF DANIEL PARTRIDGE III

DISTRICT OF COLUMBIA: SS

Daniel Partridge III, being first duly sworn, on oath deposes and says:

That no suggestion was ever made to him that Perpetual Building Association had handled the loan to the plaintiff on an "open basis" until the occasion of the taking of the deposition of Victor Sadd on June 6, 1963.

/s/ Daniel Partridge III

[JURAT: dated September 24, 1963]

[Filed October 16, 1963]

MEMORANDUM

By their cross-motions for summary judgment and at the arguments on said motions, counsel for the parties urged that there is no genuine issue of material fact and that the only question for the Court to determine is one of law involving the interpretation of a provision of the contract filed as Exhibit A to the complaint herein which reads as follows:

> "Seller agrees that this second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling."

The Court is of the opinion that the seller was required to subordinate his second deferred purchase money deed of trust to the total amount required for the refinancing of the then existing mortgage and for the remodeling of the properties. The only limitation in this regard was that the net proceeds from the new first trust should be used for the remodeling.

It is conceded that the defendant has not subordinated his second deferred purchase money deed of trust to the total financing required for the remodeling of the building, and it is the opinion of the Court that he should be required to do so in accordance with the terms of the agreement.

There being no genuine issue of material fact and the Court being of the opinion that, as a matter of law, the plaintiff is entitled to judgment, the defendant's motion for summary judgment will be denied and the plaintiff's cross-motion for summary judgment will be granted.

Counsel for plaintiff will submit an order in accordance with the foregoing.

/s/ Joseph C. McGarraghy
Judge

October 16, 1963

[Filed October 25, 1963]

JUDGMENT

This cause came on to be heard on a motion of defendant Partridge for summary judgment and on a cross-motion of plaintiff for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the court having considered the pleadings in the action, the deposition of defendant Sadd, the affidavits filed by or on behalf of the parties, and the court having heard oral argument and having found that there is no genuine issue as to any material fact and having concluded that plaintiff as a matter of law is entitled to judgment declaratory of his rights under the contract with defendant Partridge, dated June 30, 1961, as well as for specific performance of the subordination clause of said contract and for such amount as shall be due him as damages, it is hereby

ORDERED, plaintiff's motion for summary judgment is in all respects granted, defendant's motion for summary judgment be and the same here-

by is denied, defendants' counter-claims are hereby denied, with costs and disbursements to be taxed by the clerk in favor of plaintiff and against defendant, and it is further

ORDERED, ADJUDGED AND DECREED

1. The contract of sale between defendant Partridge as seller and plaintiff as buyer, dated June 30, 1961, required the seller to subordinate his second deferred purchase-money deed of trust to the total amount required for the refinancing of the then existing mortgage and for the remodeling of the properties, subject only to the limitation that the net proceeds from the new first trust should be used for the remodeling.

2. ~~It is conceded~~ That defendant has not subordinated his second purchase-money deed of trust to the total financing required for the remodeling of the building; and defendant Partridge hereby breached said contract in refusing, upon plaintiff's request in April, 1963, to subordinate his second purchase-money deed of trust, dated September 5, 1961, to a new first trust loan by The Riggs National Bank, covering the total amount required for the refinancing of the existing mortgages and for the remodeling of the properties.

3. Defendants Partridge, Sadd, and Smoot are hereby ordered and directed forthwith to subordinate the said second purchase-money deed of trust dated September 5, 1961, in the then face amount of $66,971.63, to a new first trust loan to be made by The Riggs National Bank in the amount of ~~$165,603.~~ $163,724.00

4. By the stipulation of the parties but without prejudice to the right of defendant Partridge to appeal and to contest the award of said damages in case of reversal, damages are assessed against defendant Partridge in the amount of $1,000 as of the date of this judgment.

/s/ Joseph C. McGarraghy
United States District Judge

SEEN

/s/ Philip F. Herrick

Dated: October 25, 1963

[Filed November 5, 1963]

NOTICE OF APPEAL

Notice is hereby given that Daniel Partridge III, one of the defendants above-named, hereby appeals to the Court of Appeals for the District of Columbia from that part of the final judgment entered in this action on the 25th day of October, 1963, in favor of the plaintiff and against the defendants.

DATED: November 1, 1963

/s/ Philip F. Herrick
Attorney for Appellant

* * *

BRIEF FOR APPELLEE

United States Court of Appeals

No. 18,264

DANIEL PARTRIDGE III,
as Trustee u/w Grace S. Partridge,

Appellant,

v.

CLIFFORD J. HYNNING
as General Partner of and Trustee for
Hynning Associates, a Limited Partnership,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLIFFORD J. HYNNING
Appearing Pro Se
1903-05 N Street, N. W.
Washington 36, D. C.

Of Counsel:

LAWRENCE C. MOORE
1815 H Street, N. W.
Washington, D.C.

STATEMENT OF QUESTIONS PRESENTED

The question is: Whether the subordination clause of a contract for the sale of certain old apartments requires appellant seller to subordinate his purchase-money deed of trust to appellee buyer's refinancing of the existing mortgage and the actual cost of remodeling said apartments into a modern office building, or whether appellant's obligation could be, and was, discharged short of that. The contract language reads as follows:

> Seller [appellant] agrees that this second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling.

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TABLE OF CITATIONS

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No. 18,264

DANIEL PARTRIDGE III,
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as General Partner of and Trustee for
Hynning Associates, a Limited Partnership,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is a suit for declaratory judgment and specific performance (together with damages) of a subordination clause in a contract of sale of real estate dated June 30, 1961 (J.A. 7-12). Appellant was the seller and appellee was the purchaser. The physical properties were two old residences at 1903-05 N Street, N.W., Washington, D. C. (hereinafter

called the N Street properties), which had been built more than half a century ago and which in the last several decades had been used as apartments. But their location near Connecticut Avenue and Dupont Circle, an area which is rapidly being taken over for office buildings, furnished a business opportunity for conversion into an office building for occupancy by professional persons, trade association and non-profit organizations. Codefendant Sadd knew of appellant's desire to sell his buildings on N Street, knew of appellee's interest in acquiring some buildings in the area, showed them to appellee, and informed him that they could be acquired under a contract committing the seller to subordinate his purchase-money lien to the full cost of later remodeling into an office building (J.A. 16-17, 46).

On or about May 29, 1961, codefendant Sadd prepared for appellee a written offer to purchase the N Street properties for $95,000.00 on the condition, *inter alia*, that the "Seller agrees to subordinate his trust to a new first trust to be obtained for the purpose of remodeling the properties" (Stipulation As to Contents of Joint Appendix [hereinafter called Stipulation], p. 3). Appellant's counteroffer at $103,000.00 added a proviso to the subordination clause requiring the net proceeds to be devoted to the cost of remodeling. While the price was too high, this proviso was readily acceptable to appellee who required subordination only to the extent of actual remodeling. Appellee did not expect to "mortgage out" at appellant's risk. The final contract contained the following subordination clause:

> . . . second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodelling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling. (J.A. 10)

On September 7, 1961, appellant and appellee settled title and

possession. The purchase-money deed of trust (J.A. 29-34) provided

> Said land and premises are now subject to a prior First-Trust lien. The holder of said note and the parties hereto agree that the lien created by this Trust may be subordinated to a new First Trust, provided the entire net proceeds thereof be used to pay the balance due on the present First Trust and the remodeling of the improvements on said land. The Trustee or Trustees acting hereunder shall execute *such further instruments* as may be desirable to effectuate this right of subordination. (Emphasis added) (J.A. 34).

It is clear that the overriding purposes of all parties — appellee as purchaser, appellant as seller, and codefendant Sadd as broker — arose at the very inception of the negotiations and remained constant throughout the dealings of the parties; namely, (a) appellee's plan to remodel two separate old residences into a single modern office building, and (b) appellant's contract obligation to subordinate his purchase-money lien to the cost of the remodeling. Codefendant Sadd has admitted in writing that he understood " . . . that it was agreeable to the seller to subordinate to a first mortgage providing the amount did not exceed the existing mortgages and the cost of remodelling." (J.A. 14). This admission was reaffirmed under oath by Sadd at his deposition (J.A. 19).

Appellee set about the remodeling of the N Street properties into office use, as described in detail in his affidavit filed in the Court below (J.A. 45-50). This process was long, involved, and tedious, ranging over a year in time and attended with many obstacles and uncertainties. The remodeling process was not completed until November, 1962, when appellee obtained an occupancy permit from the District Government and secured an audit of the construction accounts by a certified public accountant.

To finance the course of remodeling, appellee obtained a "construction loan" [1] from the Perpetual Building Association (hereinafter called Perpetual) in the amount of $132,500.00, to which appellant subordinated on March 15, 1962. As is frequently the case in the remodeling of an older building designed for one purpose (residential) into an entirely different use (office), the actual remodeling costs were substantially in excess of the net proceeds of the construction loan. Such excess amounted to approximately $37,000.00. When the final construction accounts were determinable, appellee requested Perpetual, which had carried the construction loan on an open basis, to increase the loan on the basis of a reappraisal of the completed office building. Meanwhile, however, the Congress had changed the law applicable to the taxation of the savings and loan industry in a manner that adversely affected Perpetual's commercial loans as distinguished from its portfolio of residential loans. Perpetual consequently decided as a matter of policy not to make any further commercial loans at that time but agreed to permit the pay-off of its loan to appellee (J.A. 48-49).

Appellee thereupon applied for refinancing to The Rigg National Bank (hereinafter called Riggs), which received an appraisal of the property in the amount of $265,000. Riggs offered to make a first trust loan at 5 1/2 per cent interest in the amount of $176,500.00. Riggs was still ready to make this loan or a smaller amount to appellee at the time of the entry of judgment in the Court below (J.A. 49-50).

Appellee requested appellant to subordinate to the Riggs financing, but, inasmuch as the net proceeds of such financing were in excess of the actual cost of remodeling, appellee offered to pay appellant in cash the amount of such excess, thereby reducing appellant's purchase-money lien by that amount. Appellant said that he was not interested in cash or in reducing the principal of his purchase-money lien

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[1] So designated by both appellant and appellee at the time of settlement of Perpetual's loan (Exhibit E to appellant's affidavit, J.A. 40).

(J.A. 49-50). Thereupon appellee modified his request to appellant to subordinate to the Riggs financing by reducing the amount to cover only the actual cost of remodeling in excess of the net proceeds of Perpetual's construction loan. When appellant again refused, appellee sued.

The issue in the Court below was phrased by appellee as follows:

> The issue is whether the contract of sale of June 30, 1961 (Exhibit A of the complaint), obligates defendant Partridge to subordinate his purchase-money lien to plaintiff's financing of the actual cost of remodeling certain old apartments of the N Street properties into a modern professional office building or whether defendant's obligation could be, and was, discharged short of that.

The suit was decided in appellee's favor upon cross-motions for summary judgment. The Court below held that appellant seller "was required to subordinate his second deferred purchase money deed of trust to the total amount required for the refinancing of the then existing mortgage and for the remodeling of the properties," and also denied appellant's counterclaim (J.A. 53).

SUMMARY OF ARGUMENT

1. Appellant seller was required by his contract to subordinate his deferred purchase-money deed of trust to the total amount required by appellee purchaser for the refinancing of the then existing mortgage and the cost of remodeling the old structures into a modern office building, and the only limitation on appellant's obligation to subordinate was that the net proceeds be used for remodeling.

2. Appellant's claim for attorney's fees and other expenses is entirely frivolous because the invoked

language of the deed of trust predicates a breach of the deed's covenants by appellee, but no such breach has here occurred, appellant being sued for his own breach of contract.

ARGUMENT

The contract between the parties (i) provided for a fixed dollar consideration from appellee, to wit, $97,500.00 for the old buildings, and (ii) obligated appellant seller to subordinate his purchase-money lien to a financing standard that was determinable, to wit, the refinancing of (a) the then existing first mortgage, and (b) appellee's costs of remodeling the old buildings from their use as apartments into a modern professional office building. In the nature of the case, this financing standard could not be fully determined until the remodeling was completed, i.e., until the apartment buildings had been converted into an office building, the remodeling costs ascertained by audit and the use of the premises for professional office purposes licensed by the District Government. The contract provisions on subordination and the negotiations leading thereto show that appellant placed no limitations on his obligation to subordinate other than on the use of the proceeds, and appellee, of course, agreed to none.

Appellee has performed all his obligations under the contract — appellant has received his consideration under the contract and appellee has successfully carried out the remodeling of the N Street properties into a modern office building. The refusal of appellant to subordinate to the refinancing from Riggs to cover the actual remodeling costs was in breach of his sales contract with appellee. If appellant were permitted to continue in such unlawful refusal to carry out his contract obligation to subordinate, he would be unjustly enriched by holding a purchase-money lien which is substantially senior in lien

to that which was agreed to by the parties under their contract.

I. Appellant seller was required by his contract to subordinate his deferred purchase-money deed of trust to the total amount required by appellee purchaser for the refinancing of the then existing mortgage and the cost of remodeling the old structures into a modern office building, and the only limitation on appellant's obligation to subordinate was that the net proceeds be used for remodeling.

The written terms of the contract demonstrate that in the minds of both seller and buyer, as was well understood by codefendant Sadd who served as broker, the terms for the sale of the N Street properties involved:

1. A consideration of $97,500.00 moving from appellee purchaser to appellant seller in exchange for the transfer of title to the N Street properties, plus

2. An obligation of appellant seller to subordinate his purchase-money lien to the costs of remodeling the premises from apartment use into an office building.

The only fixed figure that could be determined at the time of the execution of the contract of sale on June 30, 1961, was the consideration of $97,500.00 moving from appellee to appellant for the purchase of the N Street properties. The parties realized, knew and contemplated that the remodeling of the premises from apartment use to office use — and the corollary obligation of appellant to subordinate to such remodeling costs — were integral parts of the contract of sale. There was never any dispute between the parties during the course of the contract negotiations with respect to the overriding importance of the factor of remodeling and the necessity for subordination. The subordination

clause was contained in the first offer submitted on behalf of appellee by codefendant Sadd the broker; the wording of the subordination clause was expanded by appellant seller in his counteroffer as quoted above, and it remained in the final version of the contract that was executed by both parties (*supra*, p. 2). All the parties knew [2] that the appellant seller's obligation to subordinate to the costs of remodeling was of the essence of the contract and that such obligation contained no limitations as to the nature, amount or time of remodeling. The parties also knew that the financing of the remodeling was most important.

The exact cost of remodeling was not a fact in existence at the time the parties made their contract on June 30, 1961. All the parties fully realized that such cost could not be determined until appellee had in fact completed the conversion of the old residential buildings from apartment use to an office building with modern facilities that could be legally rented out for office purposes. By the very nature of the case, the costs of remodeling two separate residential buildings of fifty years vintage into a single modern office building depended on many variable factors, as listed in detail by appellee in para. 7 of his affidavit (J.A. 48-49).

The provisions of the signed contract and the negotiations between the parties leading thereto show that at no time did appellant place any limitations as to the scope of the improvements, [3] the time for making

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[2] The testimony (quoted *supra*, p. 3) of codefendant Sadd, the broker who sold the properties to appellee, is particularly persuasive on this point, for his bias, if any, would reasonably be expected to be in favor of appellant seller, the party who employed him and paid him the commission for making the sale.

[3] Cf. *Equitable Life Assurance Society v. Britton Realty Corp.*, 37 N. Y. S. 2d 85 (1942), where the contract required the submission of detailed plans and specifications to the party agreeing to subordinate.

such improvements, or the cost of such improvements expressed in dollars [4] or in percentage of value, [5] the time or times of subordination, [6] or as to any other terms of the paramount lien. [7] An appellee of course agreed to no limitations except for one limitation imposed by appellant, namely, that the net proceeds should be used for remodeling. [8]

The absence of limitations on the scope or the amount of the subordination clause was of course perfectly satisfactory to appellee, who

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[4] See *National Title Insurance Co. v. Mercury Building, Inc.*, 124 So. 2d 132 (Fla., 1960), where the contract contained specific dollar figures as to the amount of new financing.

[5] See *Collins v. Home Savings and Loan Association*, 22 Cal. Rptr. 817 (1962), where the paramount lien was limited to 80 per cent of the value of the lot, with the interest rate not to exceed 7 per cent.

[6] Note that appellant's purchase-money deed of trust commits him and codefendants Sadd and Smoot, trustees under said deed of trust, to "execute such *further instruments* as may be desirable to effectuate this right to subordinate" (emphasis added) (J.A. 34). While appellee does not make a major point out of the use of the singular or the plural, it should be noted that "instruments" was used in the plural.

[7] See *North Shore Realty Corp. v. Gallaher*, 114 So. 2d 634 (1959), where the term of the paramount lien was limited to 10 years. This case, which is also cited in appellant's brief (p. 8) in another connection is quite interesting on its facts. The contract of sale contained a specific recitation that the construction costs would amount to approximately $100,000.00, but the subordination clause itself referred only to 50 per cent of the total cost of the construction improvements without specific reference to $100,000.00. The lower court held that the subordination obligation was limited to $50,000.00, but this holding was reversed on appeal. The Supreme Court found that there was no ambiguity in a clause which provided that the lessors would subordinate their rights under the written lease to the lien of a mortgage in an amount equal to 50 per cent of the total costs of improvements, with the only limitation expressed in the clause being that the term of the mortgage should not exceed 10 years.

[8] See *Albert and Kernahan v. Franklin Arms*, 104 N.J.E. 446, 146 A. 213 (1929), where the subordination clause provided that a "mortgage was to be postponed and subordinated to that to be given by the trustee, who agreed that the money to be advanced thereon should be appropriated to the payment of expenses incurred in the erection of the apartment house" (at. p. 214). The Court refused to extend the subordination as to funds not used in construction.

was obviously interested in having the seller's obligation to subordinate expressed in unlimited form. So far as appellee could determine from the contract provisions, appellant seller "evidently was content to trust the purchaser to see that the [refinancing] terms were reasonable." [9]

The sole limitation imposed by appellant that the net proceeds should go into remodeling — and should not therefore be diverted to other purposes — was appellant's way of underscoring and emphasizing that he desired to limit his subordination to a lien pursuant to which appellee obtained funds necessary for the costs of the remodeling and wanted to make certain that the funds were used for this purpose and not for any other purpose. In so doing, appellant was taking a perfectly normal safeguard, as indicated by the quotation from the *4 American Law of Property* 218, §16.106D as follows:

> Usually subordination agreements are given by mortgagees of unimproved property to enable the mortgager to obtain a construction loan from another mortgagee, his act being based upon the expectation that the increased value of the property from the improvements will result in a better security position in spite of his now junior ranking. * * * However the mortgager, after obtaining the building loan, may divert it to other purposes or employ it in construction substantially different and less valuable than contemplated when the first mortgagee gave up his preferred position to the lender for improvement purposes. Will such a subsequent frustration of the purpose of the subordination agreement through the failure of the lender to see that his loan was applied as contemplated enable the first mortgagee to resume his original position of priority? In the absence of collusion with the mortgagor in diverting the money from its purpose, unless the subordinator has exacted an express promise

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[9] *White and Ballard, Inc., v. Goodenow*, 58 Wash. St. R. 2d 180, 361 P. 2d 571, 574 (1961).

> to see to the proper application of the sums advanced, this is a risk that the subordinator has to run.

None of these risks are present in this case. The contract of sale contains no other limitation on appellant's obligation to subordinate.

Neither appellant nor appellee was engaged in a guessing game on the scope and cost of remodeling when they drew up the subordination clause in their contract of sale. Appellant seller drafted the first and only limitation in the subordination clause. Appellant thus had the opportunity to define and limit his language. [10] Appellant could have set a specified dollar amount or a ratio to some kind of value or cost. Appellant could have required the approval of plans and specifications. [11] But appellant chose to do none of these. Appellant chose to place only one limitation on his obligation to subordinate — that the money would be used only for remodeling.

The parties are agreed that appellee has fully complied with this limitation, for the amount of additional financing from Riggs specified in the judgment below (J.A. 55) equals the amount of the actual remodeling cost in excess of the net proceeds of Perpetual's construction loan. When appellant refused to subordinate to the Riggs loan, he breached hi s contract obligation to appellee.

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[10] " . . .the mortgagee who fails precisely to delineate the scope of his agreement to subordinate will not be permitted to resume his position of priority even though his expectations have been frustrated." 42 *Yale Law Journal* 981 (1933), note commenting on *Brooklyn Trust Co. v. Fairfield Gardens, Inc.*, 260 N.Y. 16, 182 N.E. 231 (1932).

[11] See cases cited in fn. 3–8 *supra*.

II. Appellant's claim for attorney's fees and other expenses is entirely frivolous because the invoked language of the deed of trust predicates a breach of the deed's covenants by appellee; but no such breach has occurred here, appellant being sued for his own breach of contract.

The only contractual obligation upon appellee to pay "expenses of litigation" (J.A. 32), is contained in the deed of trust (J.A. 29-34) in connection with "default being made in payment of said note or of any installment of principal or interest thereon . . . " (J.A. 31). No such default has here been pleaded or found. Plainly, these provisions of the deed of trust provide for the reimbursement of the trustee for litigation arising out of the default of the mortgagee debtor, a subject which has nothing whatsoever to do with carrying out the subordination obligation of appellant seller under the contract of sale, which is the subject of this law suit. This litigation was required because of appellant's breach of his contract to subordinate, and this appeal has been made necessary by his refusal to subordinate as directed by the Court below. By no stretch of the imagination could the provision of the deed of trust be twisted to cover appellee's reimbursement of appellant's costs incident to appellant's breach of contract. Consequently there is no obligation upon appellee to pay costs and expenses, including attorney's fees of appellant. In the absence of a specific contract obligation providing for the payment of counsel fees by appellee, appellant must pay his own legal expense.

CONCLUSION

The judgment of the lower Court should be affirmed in its entirety.

Respectfully submitted,

CLIFFORD J. HYNNING
Appearing Pro Se
1903-05 N Street, N. W.
Washington 36, D. C.

Of Counsel:

LAWRENCE C. MOORE
1815 H Street, N. W.
Washington, D. C.

.BUR K. MILLER

5/1/64
MD Bar
10:00 a.m.

REPLY BRIEF OF APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 18,264

DANIEL PARTRIDGE III,
as Trustee u/w Grace S. Partridge,

Appellant,

v.

CLIFFORD J. HYNNING,
as General Partner of and Trustee for
Hynning Associates, a Limited Partnership,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHILIP F. HERRICK
1001 15th Street, N. W.
Washington 5, D. C.
Attorney for Appellant.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,264

DANIEL PARTRIDGE III,
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Appellant,

v.

CLIFFORD J. HYNNING,
as General Partner of and Trustee for
Hynning Associates, a Limited Partnership,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

I.

1. In good part, appellee's argument begs the question. At pages 6-7 and 8 of his brief, he states that the contract between the parties obligated appellant to subordinate his purchase money lien to the costs of remodeling the premises. Were this accurate, there would be no argument, but it is not accurate. Appellant agreed to subordinate his purchase

money lien to "a new first trust to be obtained in connection with . . . the remodeling of the properties," not to a second new first trust in the amount of the remodeling costs. In this connection appellee's brief (p. 2) states that Victor Sadd, the real estate broker who handled the transaction between the parties, informed appellee that the premises could be acquired under a contract committing appellant to subordinate his purchase money lien to the full cost of later remodeling. Neither appellee's citations nor any other portions of the record support this statement.

2. Appellee's brief (p. 7) states that both appellant and appellee understood that appellant was to subordinate to the costs of the remodeling. This is certainly not true insofar as appellant is concerned. The contract itself does not spell out any such understanding, and if this is what the appellee had in mind when the contract was made, he should have seen to it that the contract so provided. Appellant had in mind only a loan made prior to the construction work (J.A. 28-29), and he was careful to see to it (J.A. 40) that appellee complied with all of the terms of his construction loan agreement (which is set forth at J.A. 40-44).

3. Appellee contends that the remodeling was an integral part of the contract between the parties (J.A. 7), and that he has complied with his "obligation" to remodel (J.A. 6; cf. J.A. 7). There was, however, no such obligation. There was nothing in the contract which required appellee to remodel. The option was his. Once he determined to remodel, appellant had to subordinate to "a new first trust," and when appellee went ahead with his construction loan, appellant required him (see J.A. 40) not to depart from the terms and conditions of the construction loan agreement with the lender (J.A. 40-44).

4. The authorship of the subordination agreement is not in doubt. The first draft was submitted by appellee in his original offer to purchase the property (Stipulation As To Contents of Joint Appendix, p. 3). It provided that "Seller [appellant] agrees to subordinate this trust to a new first trust to be obtained for the purpose of remodeling the

properties." (Id.) In his counter-offer, appellant used the same words and added, "provided the entire net proceeds thereof be devoted to such remodeling." (Id.) Appellee then made a second written offer which became the final contract (J.A. 46). The final version differs somewhat, in both of its clauses, from the earlier versions.

Appellee contends (Brief, p. 11) that appellant, when he required that the net proceeds of the construction loan be used for the remodeling, should have imposed further conditions. Appellant might have done so had he had any reason to anticipate a second request by appellee that he subordinate. But appellant had in mind only the subordination to a before-the-work construction loan, and his security at that point was sufficient for his protection.[1] The overall subordination clause was for the protection of appellee. He, and only he, apparently knew that he would want a second subordination from appellant, and he should have provided for it by reference to a second subordination or to subordinations which would equal the remodeling costs. If he had a second subordination in mind, and it appears that he did, he should have written it into the contract. If he did not have it in mind, then it is certainly not a part of the contract, for it is clear that appellant did not have it in mind.

II.

With respect to appellant's counterclaim for attorney's fees and expenses, appellee's liability is not limited to litigation growing out of a default in the payment of his note. Appellee's deed of trust (J.A. 29-34) provides that "upon any default in payment, on demand, of any sum or sums advanced by the holder . . . of said note on account of any costs and expenses of this Trust, or on account of any such tax or assessment, or insurance, or expense of litigation . . ., the same may be paid by the holder . . . and all sums advanced . . . shall forthwith attach as a lien and be demandable at any time . . ." (J.A. 32). The deed of trust

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[1] In this connection, appellee argues that all parties realized that the remodeling costs could not be determined until later (Brief, p. 8). There is nothing in the record, however, to show that appellant considered this matter at all or that he "realized" anything with respect to when the costs would be determined. If appellee realized it he should have provided for it.

recites that appellee desires "to secure the reimbursement to the holder . . . for all money which may be advanced as herein provided for, and for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity, which may arise in respect to this trust" (J.A. 30). Appellee's note provides that if default is made in the performance of any of the terms, covenants and conditions of the deed of trust, then the whole becomes due, and appellee agreed to pay all proper costs and expenses, including attorney's fees, in the event of such default (J.A. 30).

It thus appears that appellee agreed to reimburse appellant, on demand, for his expenses of litigation (including counsel fees), at law or in equity, arising out of the trust. The counterclaim fits all those conditions.

Respectfully submitted,

PHILIP F. HERRICK
1001 15th Street, N. W.
Washington, D. C.
Attorney for Appellant

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,264

DANIEL PARTRIDGE III,
as Trustee u/w Grace S. Partridge,

Appellant,

v.

CLIFFORD J. HYNNING,
as General Partner of and Trustee for
Hynning Associates, a Limited Partnership,

Appellee.

Appeal From The United States District Court
For The District of Columbia

APPELLEE'S PETITION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Clifford J. Hynning, the defendant-appellee above named (hereinafter called the purchaser), presents this, his petition for a rehearing *en banc* in the above-entitled cause, and, in support thereof, respectfully shows:

I.

The Court, in its opinion of reversal herein, exhibits a mechanical style of judicial reasoning, which is in conflict with the method of con-

struing contracts laid down by this Circuit in *Stinson v. New York Life Insurance Co.*, 83 App. D.C. 115, 167 F.2d 233 (1945) and by other Federal and State courts, in that

(a) The Court bottomed its construction of a commercial contract on the one-letter indefinite article "a," as found in a subordination clause reading as follows:

> Seller agrees that this second deferred purchase money deed of trust may be subordinated in lien to a new first trust to be obtained in connection with the refinancing of the existing mortgage and the remodeling of the properties, provided an amount equal to the entire net proceeds be used for the remodeling. (Emphasis added.)

The Court held that the seller "should not be forced to subordinate a second time," notwithstanding the reasoning of the trial court, which had held:

> . . . that the seller was required to subordinate his second deferred purchase money deed of trust to the total amount required for the refinancing of the then existing mortgage and for the remodeling of the properties. The only limitation in this regard was that the net proceeds from the new first trust should be used for the remodeling.
>
> It is conceded that the defendant has not subordinated his second deferred purchase money deed of trust to the total financing required for the remodeling of the building, and it is the opinion of the Court that he should be required to do so in accordance with the terms of the agreement. (J.A. 53-54)

The Court in no wise alluded to the reasoning of the trial court, save for brief statement that it had granted summary judgment for the purchaser.

(b) The Court, in its construction of the contractual obligation of the seller to subordinate, displayed no awareness of or interest in the "purpose of the contract and the circumstances surrounding its execution,"[1] to-wit, the function of a subordination obligation of the seller in facilitating the sale of downtown real property requiring extensive improvements in order for it to yield an income which would justify the sales price and without which the sale could not have been consummated between the parties. Only by agreeing to subordinate the purchase-money mortgage to the new financing of remodeling was the seller enabled to secure a sales price predicated upon the potential use of the property as remodeled. The utter silence of the Court on the purpose and circumstances of the contract (including the successive versions of the subordination clause in the course of the negotiations of the parties) is in strong contrast with the style of judicial reasoning employed by this Circuit in *Stinson*, cited *supra*. Also see 3 *Corbin on Contracts* 163-65; 2 *Powell on Real Property*, § 317; *Restatement of the Law of Property*, § 241; and *Restatement of the Law of Contracts*, § 235d. The intentions of the contracting parties have been frustrated by the Court's reversal, which turned a serious commercial undertaking into a guessing game.

II.

In its statement of the contentions of the parties and the facts of the case, the Court misconceived the record of a case submitted on cross motions for summary judgment in the following particulars:

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[1] Quoted from *Stinson v. New York Life Insurance Company*, 83 U.S. App. D.C. 115, 167 F.2d 233, 235 (1945).

"Generally speaking, contracts should not be so narrowly or technically construed as to relieve the obligor from a liability fairly within the scope or spirit of their terms, nor should they be so loosely construed as to frustrate their obvious design."

(a) The Court attributed to the purchaser a position — that he "claims the Perpetual financing was a construction loan only" (emphasis added) — which the purchaser never took in his complaint (J.A. 3-5), in his affidavit in support of his cross motion of summary judgment (J.A. 46-49), and in his written brief (filed February 12, 1964); and, moreover, the purchaser expressly disavowed any such position in the oral argument before the Court.

(b) Having thus set up a straw-man argument, the Court found it "belied" by its selective recitation of the Perpetual loan, omitting the following undisputed facts of record:

(i) that Perpetual had handled the loan on an open basis until the remodeling was completed (para. 15 of J.A. 49);

(ii) that Perpetual had declined to increase any of its commercial loans in view of recent changes of the Internal Revenue Code affecting commercial loans by the savings and loan industry (Appendix A to this petition [2]); and, consequently,

(iii) that Perpetual was willing in this case to waive its loan ban on paying off the loan during its first five years and to

> accept payment in full of the unpaid balance upon the payment of a 1% advance interest on the unpaid balance. The terms of the original commitment regarding this pay off will be revised accordingly. (Appendix A)

The one per cent payment represented a reduction by one-half of the payoff fee of two per cent, which originally applied to any payoff during

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[2] This exhibit was plaintiff's Exhibit G in the record before the trial court, but was omitted from the documents reproduced in the Joint Appendix, since neither party, nor the trial court had questioned Perpetual's revised commitment to accept immediate payoff at a reduced fee. It has been reproduced as Appendix A hereto as a convenience in reference.

the second five years. Clearly these uncontested facts on Perpetual's loan did not "belie" the contentions of the purchaser, who had stated the issue before the Court as follows:

> Whether the subordination clause of a contract for the sale of certain old apartments requires appellant seller to subordinate his purchase-money deed of trust to appellee buyer's refinancing of the existing mortgage and the actual cost of remodeling said apartments into a modern office building, or whether appellant's obligation could be, and was, discharged short of that. (Appellee's brief, p. i)

(c) The only tests cited by the Court with respect to the subordination obligation of the seller are in terms which are found nowhere in the contract of sale, such as "a temporary construction loan", "permanent financing," "[the purchaser] simply estimated its [remodeling] cost," and "[the purchaser] grossly underestimated its [remodeling]cost."

(d) The Court did not even deign to mention the test specifically applied by the trial court to the subordination obligation of the seller — to-wit, the only limitation found on the subordination clause in the contract of sale, that the net proceeds from the new first trust should be used for the remodeling, as set forth in I(a) above.

(e) Having ignored the economic function of a subordination obligation in relation to the consideration for the sale of real estate, as stated in para. (b) of I above, the Court, understandably, but inaccurately, and prejudicially, referred to the "additional burden" required of the seller by trial court which had ordered him to subordinate to "the total financing required for the remodeling of the building" (J.A. 54). [3]

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[3] The Court's opinion also referred to a commitment of financing from the Riggs National Bank in the amount of $176,500 without noting that both the purchaser in his complaint (para. 12 of J.A. 4) and the trial court in its order fixing $163,724 (J.A. 55) had stated that the Riggs loan should be reduced from its maximum level (from a credit standpoint) so as to cover only the actual costs of remodeling in excess of the net proceeds of Perpetual's loan and the retirement of the original first trust.

(f) The above misconceptions are at such variance with the purchaser's factual assertions in his complaint and supporting affidavit and exhibits (including the admission and deposition of the broker, who was a codefendant below, J.A. 14, 18-19, 23) as would have presented a "genuine issue as to any material fact" if the Court's statement of the case had been made in the trial court by the opposing party. In consequence, the Court's remand "for the entry of summary judgment" for the seller is in clear violation of Rule 56(c) of the Federal Rules of Civil Procedure.[4] True, the purchaser had joined with the seller in requesting the disposition of the case on the basis of cross motions for summary judgment, but his request was predicated on the factual allegations of the pleadings and the supporting exhibits, not on the statement of "facts" presented in the opinion of the Court.

III.

The Court's very short opinion, without citation of any legal authorities of any kind, fails to illumine a subject of growing importance to the Washington community; namely, the function and scope of a subordination clause in a contract for the sale of real property in need of extensive improvements. A subordination clause is a financing technique of importance in redeveloping the downtown area and in promoting

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[4] *Cf.* the recent per curiam decision on May 25, 1964, of the Second Circuit sitting *en banc* in *Petrol Shipping Corporation v. The Kingdom of Greece*, No. 119, Docket No. 28188, altering the decision of the panel, 326 F.2d 117, which had affirmed the judgment of the District Court dismissing an attempt by a shipping company to enforce compliance with an arbitral clause in a maritime contract with the Greek Ministry of Commerce. Sitting *en banc*, the Second Circuit remanded the case to the District Court with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made. __F.2d__.

orderly growth in outlying areas of large metropolitan areas. But nothing in the Court's opinion recognizes this.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing *en banc* be granted and that the judgment of the District Court be, upon further consideration, affirmed.

Respectfully submitted,

Clifford J. Hynning
1903-05 N Street, N.W.
Washington, D. C.
Appearing pro se

Of Counsel:

Lawrence C. Moore
1815 H Street, N.W.
Washington, D. C.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

CLIFFORD J. HYNNING
1903-05 N Street, N.W.
Washington, D. C.

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing petition for rehearing upon Philip F. Herrick, 1001 Fifteenth Street, N.W., Attorney for Appellant, this 25th day of June, 1964.

CLIFFORD J. HYNNING
1903-05 N Street, N.W.
Washington, D. C.

APPENDIX A

PERPETUAL BUILDING ASSOCIATION
Organized 1881
Member Federal Savings and Loan Insurance Corporation
Eleventh and E Streets Northwest
WASHINGTON 4, D. C.

June 12, 1963

Mr. Clifford J. Hynning
1903-05 N Street, N.W.
Washington 6, D. C.

Dear Mr. Hynning:

This is in reply to your letter of May 16 and our telephone conversation of the day before in connection with this Association's refusal to consider an additional loan on property at 1903-05 N Street, N.W., being our present loan Series 186-5224.

As you know, the new tax law affecting the savings and loan industry became effective January 1, 1963, and in the restrictive portion there was a percentage limitation on the amount of commercial property an association could have in its portfolio. Inasmuch as we are slightly over this ratio, we have declined to consider any commercial loans. Our purpose, of course, is to reduce this percentage to the level required.

This Association will accept payment in full of the unpaid balance upon the payment of a 1% advance interest on the unpaid balance. The terms of the original commitment regarding this pay off will be revised accordingly.

Very truly yours,

Wm. H. Dyer

WHD:jh

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,264

DANIEL PARTRIDGE III,
as Trustee u/w Grace S. Partridge,

Appellant,

v.

CLIFFORD J. HYNNING,
as General Partner of and Trustee for
Hynning Associates, a Limited Partnership,

Appellee.

Appeal From The United States District Court
For The District of Columbia

APPELLANT'S ANSWER TO PETITION FOR REHEARING EN BANC

The Court's decision of June 11, 1964 is clearly correct. It goes directly to the point of the case. There is no cause for the Court to comment, as appellee argues it should, on the economic function of a subordination clause or upon the reasoning of the trial court. Nor is there cause for it to consider, as appellee believes

it should, appellee's arguments that Perpetual handled the loan on an open basis, or that Perpetual declined for statutory reasons to consider an additional loan to appellee, or that Perpetual was willing for a consideration to waive the ban against paying off the note during the first five years (this latter point was specifically footnoted in the Court's decision).

The Court has not rewritten the facts, nor has it set up a straw-man argument, as appellee claims. The Court has looked directly at the heart of the matter: what did the parties' contract require appellant to do by way of subordination? The answer is that the contract required appellant to subordinate "to a new first trust" obtained in connection with the remodeling, and that appellant did just that. The Court has decided, correctly, that in so doing appellant fulfilled his obligation.

Appellee did not, he argues, claim that "the Perpetual financing was a construction loan only" (Petition for Rehearing, p. 4), and he objects to the Court's use of the term "permanent financing" as not being found in the contract (Id., p. 5). While the terms "construction loan" and "permanent loan" go back to appellee's first pleading (see Complaint, paragraphs 8, 9, 10, 12, 14 and 15 at JA 3, 4 and 5), the nomenclature is not important. The crux of the matter is that appellant agreed to subordinate to a new first trust to be obtained in connection with the remodeling, that appellee obtained such a loan, secured by a deed of trust, which was to run for 18 years and which could not by its terms be paid off during the first five years, and appellant subordinated to it. There was no reason for appellant to contemplate any further subordination, and the Court's decision is clearly correct.

Respectfully submitted,

Philip F. Herrick
1001 - 15th Street, N.W.
Washington, D.C. 20005

Attorney for Appellant.

CERTIFICATE OF SERVICE

I certify that on this 2nddday of July, 1964, I served copies of the foregoing Appellant's Answer to Petition for Rehearing En Banc on Clifford J. Hynning, Esq., 1903 N Street, N.W., Washington, D.C. 20036, and on Lawrence C. Moore, Esq., 1815 H Street, N.W., Washington, D.C. 20006.

Philip F. Herrick